TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~605.~~ 336

WILLIAM S. PIKE, PLAINTIFF IN ERROR,

vs.

MARY P. EVANS, WILLIAM S. EVANS, AND ELIZA C. JOHNSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED OCTOBER 14, 1874.

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No. 605.

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1 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

MRS. MARY P. EVANS AND WM. S. EVANS
vs.
WILLIAM S. PIKE. } No. 6494.

Petition in ejectment.—Filed July 19th, 1871.

To the honorable the judges of the United States circuit court in and for the 5th judicial circuit and district of Louisiana:

The petition of Mary P. Evans, and Wm. S. Evans, her husband, who joins her herein for the purpose of authorizing and assisting the prosecution of this suit, both of whom are citizens of the State of Pennsylvania, residing in Philadelphia, respectfully represents:

That the said Mary P. Evans is the true and lawful owner of the one undivided half of the following described property, situate and
2 lying in the parish of East Baton Rouge, in the State of Louisiana, viz: A certain tract of land, or plantation, known as "Richland Plantation," situate in the parish of East Baton Rouge, at about two and one-half miles from the city of Baton Rouge, and containing nineteen hundred and eleven (1,911) acres, more or less, with all the buildings and improvements thereto belonging; which said undivided one-half, of the value of twenty thousand dollars; and was purchased from Henry Perkins, by act passed before Octave Morel, notary, of the city of New Orleans, 11th day of March, 1871.

Your petitioners further allege that, notwithstanding the legal title of the said Mary P. Evans therein, and her right to the possession of her interest in said "Richland Plantation," one William S. Pike, who is a citizen of the State of Louisiana, has wrongfully entered into the possession thereof, under some sort of pretended but void title, and now unlawfully detains the same, to the great damage and injury of your petitioner, and refuses to recognize the right and title of said Mary P. Evans.

3 And your petitioner represents that the said Wm. S. Pike is in possession of said plantation through his tenants and lessees, whose names are unknown to them.

Your petitioners further represent that said plantation can be rented for the sum of six thousand dollars per annum, and that they are entitled to recover one-half of this sum, as rents and profits, from the 11th day of March, 1871, until the said Mary P. Evans is put in possession of said interest in the Richland Plantation.

Wherefore petitioners pray that the said William S. Pike may be cited to answer this demand; that, after due process had, they may have judgment against him decreeing Mary P. Evans to be the owner of one-half of said Richland Plantation, and entitled to the possession thereof; and that she may have the sum of three thousand dollars per annum, as rents and profits, from the 11th day of March, 1871, until she is put in possession of her one-half of her said property. And petitioners pray for costs of suit, and all general relief in the premises.

(Signed) WM. GRANT, *Atty.*

REC. 605—1

4 *Citation to William S. Pike.—Issued July 19th, A. D.* 1871.

The President of the United States of America to the marshal of the district of Louisiana, greeting:

MRS. MARY P. EVANS AND WM. S. EVANS
vs.
WM. S. PIKE. } No. 6494.

You are hereby commanded to summon William S. Pike, a citizen of the State of Louisiana, to comply with the demand of Mrs. Mary P. Evans, & Wm. S. Evans, her husband, citizens of the State of Pennsylvania, contained in the petition of *of* which a copy accompanies this citation, or to deliver his answer to the same in the office of the clerk of the circuit court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans, in ten days after service hereof, or judgment will be rendered against him by default; which delay is increased one day for every ten miles the defendant's residence is distant from New Orleans, the place where the court is held;
5 and that you make due return hereof on the first Monday of August, 1871.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 19th day of July, A. D. one thousand eight hundred and seventy-one, and the 95th year.

[SEAL.] (Signed) F. A. WOOLFLEY, *Clerk*,
(") By F. B. VINOT, *Dy. Clerk*.

Marshal's return.

Received July 21, 1871, by the U. S. marshal, and on the 27th day of July, 1871, served a copy of the within citation, plaintiffs' petition accompanying the same, personally on Wm. S. Pike, at his office on Camp street, between Canal and Common streets, in this city.

New Orleans, July 27th, 1871.

(Signed) GUS. HOLLANDER,
Dy. U. S. Marshal.

Amended petition in ejectment.—Filed October 4th, 1871.

United States circuit court for the fifth judicial circuit and district of Louisiana.

6 MARY P. EVANS & WILLIAM R. EVANS
vs.
WILLIAM S. PIKE. } No. 6494.

To the honorable W. B. Woods, judge of the said court:

The amended petition of Mary P. Evans, and William R. Evans, her husband, who joins her herein for the purpose of authorizing the institution and prosecution of this suit, respectfully represents that your petitioners are both citizens of the State Pennsylvania, residing in the city of Philadelphia, and were such at the date of filing the original petition; that your petitioner, Mary P. Evans, whose maiden name was Mary Perkins, was, on the 5th day of September, 1861, the wife of S. Duncan Linten, now deceased; and that her uncle, Ackley Perkins, by a certain act of donation passed before William Hubbs, recorder of the

parish of East Baton Rouge, on the 5th day of September, 1861, for various good and valid considerations, did give, donate, transfer, assign, and set over unto her, she then and there accepting, with the authorization of her said late husband, S. Duncan Linten, all and singu-
7 lar, the following described property, vize:

1st. A certain tract of land or plantation, then in the cultivation of sugar, situate about two miles from the city of Baton Rouge, containing seventeen hundred and thirty (1,730) arpents, more or less, with all the buildings and improvements thereon, consisting of a dwelling-house, sugar-house, mills, and machinery of every description, and all the out-houses pertaining to the same; it being the same property acquired by J. & H. Perkins from E. Howell, on the 19th day of December, 1835, & being usually known and designated as the "Richland Plantation," though not specifically designated as such in said act of donation.

2nd. One hundred acres of land purchased by said J & H. Perkins from a col*l*ored woman named Phœbe Anderson.

3rd. A tract of land purchased by J. & H. Perkins of Mrs. Williams, containing five hundred acres, more or less.

All of which said property, real estate, is situate in the parish
8 of East Baton Rouge, in the State of Louisiana, and it is the same property acquired by the said Ackley Perkins, by purchase at sheriff's sale on the 5th day of January, 1861, in the suit of Fellows & Co. against J. & H. Perkins, No. 1610, of the records of the 6th judicial dist. court for the parish of East Baton Rouge, State of Louisiana.

And the tract of land first above described is the same property or *or* plantation also acquired by the said Ackley Perkins on the 3rd day of August, 1861, at sheriff's sale, in the suit of Eliza C. Johnson vs. J. & H. Perkins, No. 1311, of the records of the 7th district court for the parish of East Fliciana, State of Louisiana.

And your petitioner, Mary P. Evans, and her late husband, S. Duncan Linten, at the date of said act of donation, immediately went into the possession of said property, and remained in the peac'able and undisputed possession thereof until on or about the 6th day of January, 1866, when, they being absent from the State of Louisiana, one William S. Pike forcibly, wrongfully, and without the consent of your petitioner, entered upon and took possession thereof, and has remained
9 in possession ever since without petitioner's consent, and still holds the same adversely, through his agents and tenants, and refuses to surrender the same, greatly to her detriment and damage; that the said William S. Pike has no title to said property, and has possessed the same from the first in bad faith.

Petitioner further represents that she took the deed set forth in her original petition from Henry Perkins merely to strengthen her original title; and that she claims the whole of said property by virtue of the aforesaid act of donation from Ackley Perkins, as the bases of such title and claim; that the original petition to which this is an amendment was drawn & filed by her counsel in error of the facts as stated by her to him, and that she has caused such error to be corrected as soon as advised of its existence.

Your petitioners further represent that said first-mentioned tract of land or plantation is of the value of seventy-five thousand dollars, and
10 that it has been worth a rental of seventy-five hundred dollars per annum since the 6th day of January, 1866, while it has been in the possession of the said Wm. S. Pike, as aforesaid, which he ought to pay to your petitioner as rents and profits; and that the rents and profits from the date of filing this suit hence until the defendant shall

surrender said property are fairly worth ten thousand dollars a year, which of right he ought to pay.

Petitioner alleges that the said William S. Pike is a citizen of the State of Louisiana, and resides in this district within the jurisdiction of the court.

Wherefore petitioners pray leave to file this amended petition; that defendant may be cited to answer this demand; and that your petitioner, Mary P. Evans, may have judgment for, and decreeing her to be the true owner of, the whole of said three pieces of property above fully described, and decreeing her to have the possession thereof; that she may have judgment against defendant for the sum of seven thou-
sand and five hundred dollars per annum, rents and profits of
11 said plantation first described, from the 6th day of January, 1866,
to the 19th day of July, 1871, the date when this suit was filed. And she further prays for judgment against defendant for rents and profits of said plantation, at the rate of ten thousand dollars per annum, from the said 19th day of July, 1871, until he shall surrender said property. And she prays for such writs from time to time from this honorable court as may be necessary to *centeral* her rights in the premises, and to enforce the final judgment which may be rendered. & she prays for costs of suit, and all general relief in the premises.

(Signed) WILLIAM GRANT,
Atty. for Petitioner.

Order.

Let this amended petition be filed as prayed for, and let defendant be cited to answer the same according to law.

(Signed) W. B. WOODS,
U. S. Circuit Judge, 5th Circuit and District of Louisiana.

12 *Citation to William S. Pike.—Issued October 4th, 1871.*

The President of the United States of America to the marshal of the district of Louisiana, greeting:

MARY P. EVANS AND WM. R. EVANS
vs.
WILLIAM S. PIKE. } No. 6494.

You are hereby commanded to summon William S. Pike, a citizen of the State of Louisiana, to comply with the demand of Mary P. Evans, and William R. Evans, her husband, citizens of the State of Pennsylvania, contained in the amended petition, of which a copy accompanies this citation, or to deliver his answer to the same in the office of the clerk of the circuit court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans, in ten days after service hereof, or judgment will be rendered against him by default, which delay is increased on' day for every ten miles the defendant's residence
is distant from New Orleans, the place where the court is held;
13 and that you make due return hereof on the first Monday of November, 1871.

Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 4th day of October, A. D. one thousand eight hundred and seventy-one, and the 90th year.

[SEAL.] (Signed) F. A. WOOLFLEY, *Clerk*,
(") By F. B. VINOT, *Dy. Clerk.*

Marshal's return.

Received Octo. 5th, 1871, by the U. S. marshal, and on the 11th day of same month and year served a copy of within citation and accompanying petition Wm. S. Pike, named herein, in the following manner: by handing the same to him in person at No. 15 Camp street, in this city.

New Orleans, Octo. 11th, 1871.

(Signed) S. W. REED,
Dy. U. S. Marshal.

Answer and call in warranty of Wm. S. Pike.—Filed December 2d, 1871.

14 United States circuit court for the fifth judicial circuit and district of Louisiana.

MRS. MARY P. EVANS AND WM. R. EVANS
vs.
WM. S. PIKE. } No. 6494.

Now comes defendant, Wm. S. Pike, by his undersigned counsel, and for answer to the petition and amended petition of plaintiff denies all and singular the allegations in said petition contained. He especially denies that plaintiffs are the owners of, or have any right, title, or interest in, the plantation known as the Richland Plantation, situated in the parish of East Baton Rouge, or any other lands set forth and more fully described in their petitions.

Respondent avers that he is the true and lawful owner of said plantation, having purchased the same at sheriff's sale on the sixth day of January, A. D. 1866; that Edward Cousinard, sheriff of the parish of East Baton Rouge, by virtue of a writ of fieri facias, issued on a twelve-months' bond, and to him directed from the honorable the seventh
15 judicial district court of the State of Louisiana in and for the parish of West Feliciana, against the goods and chattels, lands and tenements, of Ackley Perkins, J. M. Williams, and Wm. S. Pike, at the suit of Eliza C. Johnson vs. J. & H. Perkins, No. 1311 of the records of the honorable the seventh judicial district court in and for the parish of West Feliciana, did seize the said plantation, known as Richland Plantation, and, after due advertisement and the forms prescribed by law, did expose the same to public sale, when respondent became the purchaser thereof; all of which will more fully appear from the title made to him by the said sheriff, a copy of which is hereto annexed for reference, and marked "A." Respondent further shows that the said suit of Eliza C. Johnson vs. J. & H. Perkins was based upon a certain number of notes given as part of the purchase-price of said Richland Plantation, and bore mortgage, with vendor's lien and privilege on the same; that said J. & H. Perkins, defendants in said suit, confessed judgment in favor of the plaintiff, Eliza C. Johnson, which judgment was entered up on the 2d day of June, A. D. 1859; that execution
16 issued upon the judgment, and was enjoined by Henry Perkins; but that said injunction-suit was dissolved with damages, and on the 3rd day of August, A. D. 1861, the mortgaged property was sold by the sheriff on twelve months' credit, when Ackley Perkins became the purchaser, executing his twelve-months' bond in favor of Eliza C. Johnson, the plaintiff, in execution for the sum of $30,695.80, with J. M. Williams and Wm. S. Pike as sureties thereon; that when the said

surrender said property are fairly worth ten thousand dollars a year, which of right he ought to pay.

Petitioner alleges that the said William S. Pike is a citizen of the State of Louisiana, and resides in this district within the jurisdiction of the court.

Wherefore petitioners pray leave to file this amended petition; that defendant may be cited to answer this demand; and that your petitioner, Mary P. Evans, may have judgment for, and decreeing her to be the true owner of, the whole of said three pieces of property above fully described, and decreeing her to have the possession thereof; that she may have judgment against defendant for the sum of seven thou-
sand and five hundred dollars per annum, rents and profits of
11 said plantation first described, from the 6th day of January, 1866,
to the 19th day of July, 1871, the date when this suit was filed. And she further prays for judgment against defendant for rents and profits of said plantation, at the rate of ten thousand dollars per annum, from the said 19th day of July, 1871, until he shall surrender said property. And she prays for such writs from time to time from this honorable court as may be necessary to *centeral* her rights in the premises, and to enforce the final judgment which may be rendered. & she prays for costs of suit, and all general relief in the premises.

(Signed) WILLIAM GRANT,
Atty. for Petitioner.

Order.

Let this amended petition be filed as prayed for, and let defendant be cited to answer the same according to law.

(Signed) W. B. WOODS,
U. S. Circuit Judge, 5th Circuit and District of Louisiana.

12 *Citation to William S. Pike.—Issued October 4th, 1871.*

The President of the United States of America to the marshal of the district of Louisiana, greeting:

MARY P. EVANS AND WM. R. EVANS
vs.
WILLIAM S. PIKE. } No. 6494.

You are hereby commanded to summon William S. Pike, a citizen of the State of Louisiana, to comply with the demand of Mary P. Evans, and William R. Evans, her husband, citizens of the State of Pennsylvania, contained in the amended petition, of which a copy accompanies this citation, or to deliver his answer to the same in the office of the clerk of the circuit court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans, in ten days after service hereof, or judgment will be rendered against him by default, which delay is increased on' day for every ten miles the defendant's residence
is distant from New Orleans, the place where the court is held;
13 and that you make due return hereof on the first Monday of November, 1871.

Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 4th day of October, A. D. one thousand eight hundred and seventy-one, and the 90th year.

[SEAL.] (Signed) F. A. WOOLFLEY, *Clerk*,
(") By F. B. VINOT, *Dy. Clerk.*

Marshal's return.

Received Octo. 5th, 1871, by the U. S. marshal, and on the 11th day of same month and year served a copy of within citation and accompanying petition Wm. S. Pike, named herein, in the following manner: by handing the same to him in person at No. 15 Camp street, in this city.

New Orleans, Octo. 11th, 1871.

(Signed) S. W. REED,
Dy. U. S. Marshal.

Answer and call in warranty of Wm. S. Pike.—Filed December 2d, 1871.

14 United States circuit court for the fifth judicial circuit and district of Louisiana.

MRS. MARY P. EVANS AND WM. R. EVANS
vs.
WM. S. PIKE. } No. 6494.

Now comes defendant, Wm. S. Pike, by his undersigned counsel, and for answer to the petition and amended petition of plaintiff denies all and singular the allegations in said petition contained. He especially denies that plaintiffs are the owners of, or have any right, title, or interest in, the plantation known as the Richland Plantation, situated in the parish of East Baton Rouge, or any other lands set forth and more fully described in their petitions.

Respondent avers that he is the true and lawful owner of said plantation, having purchased the same at sheriff's sale on the sixth day of January, A. D. 1866; that Edward Cousinard, sheriff of the parish of East Baton Rouge, by virtue of a writ of fieri facias, issued on a twelve-months' bond, and to him directed from the honorable the seventh
15 judicial district court of the State of Louisiana in and for the parish of West Feliciana, against the goods and chattels, lands and tenements, of Ackley Perkins, J. M. Williams, and Wm. S. Pike, at the suit of Eliza C. Johnson vs. J. & H. Perkins, No. 1311 of the records of the honorable the seventh judicial district court in and for the parish of West Feliciana, did seize the said plantation, known as Richland Plantation, and, after due advertisement and the forms prescribed by law, did expose the same to public sale, when respondent became the purchaser thereof; all of which will more fully appear from the title made to him by the said sheriff, a copy of which is hereto annexed for reference, and marked "A." Respondent further shows that the said suit of Eliza C. Johnson vs. J. & H. Perkins was based upon a certain number of notes given as part of the purchase-price of said Richland Plantation, and bore mortgage, with vendor's lien and privilege on the same; that said J. & H. Perkins, defendants in said suit, confessed judgment in favor of the plaintiff, Eliza C. Johnson, which judgment was entered up on the 2d day of June, A. D. 1859; that execution
16 issued upon the judgment, and was enjoined by Henry Perkins; but that said injunction-suit was dissolved with damages, and on the 3rd day of August, A. D. 1861, the mortgaged property was sold by the sheriff on twelve months' credit, when Ackley Perkins became the purchaser, executing his twelve-months' bond in favor of Eliza C. Johnson, the plaintiff, in execution for the sum of $30,695.80, with J. M. Williams and Wm. S. Pike as sureties thereon; that when the said

property was sold by the sheriff to satisfy said bond, as above set forth, Wm. S. Pike, defendant herein, became the purchaser for the sum of $46,725.00, which said amount was paid in full to the said Eliza C. Johnson.

Respondent further avers that the pretended donation made by Ackley Perkins to his niece, Mrs. Mary Perkings, wife of Stephen Duncan Linten, now Mrs. Mary P. Evans, plaintiff in this suit, is null and void; that said Ackley Perkins had not then, nor has he since, paid anything for said property, or any portion thereof, and that said pretended donation was made in fraud of his creditors; avers that
17 the said Eliza C. Johnson and Ackley Perkins are bound in law to warrant and defend respondent in this suit, and protect him in his title.

Wherefore he prays that they be duly cited and called in warranty, and that respondent have judgement against them, the said Eliza C. Johnson and Ackley Perkins, in solido, for whatever amount may be rendered against respondent; that plaintiffs' suit be dismissed with costs. He prays trial by jury, and all general and equitable relief.

(Signed) ~~Sheriff's sale~~ HAYS & NEW,
Attys. for Respt.

Document "A," referred to in answer of Wm. S. Pike, & annexed.

Sheriff sale of the Richland Plantation to Wm. S. Pike, January 6th, 1866.

STATE OF LOUISIANA:

Whereas I, Edward Cousinard, sheriff of the parish of East Baton Rouge, by virtue of a fieri facias issued on a twelve-months' bond, and to me directed from the honorable seventh judicial district court of the State of Louisiana in and for the parish of West Feliciana,
18 against the goods and chattles, lands and tenements, of Ac'ley Perkins, J. M. Williams, & William S. Pike, at the suit of Eliza C. Johnson vs. J. & H. Perkins, No. 1311, of the records of the honl. seventh judicial district court in and for the parish of West Feliciana, State aforesaid, did seize the property hereinafter set forth and described, to wit:

"A certain tract of land or plantation known as the 'Richland Plantation,' & situated in the parish of East Baton Rouge, at about two and a half miles from the city of Baton Rouge, and containing nineteen hundred and eleven (1,911) acres, more or less, with all the buildings and improvements thereunto belonging."

Which property was advertised in the Baton Rouge Gazette & Comet, a public newspaper published in this parish, East Baton Rouge, as the law requires, for fully thirty days, to be offered at public sale in front of the court-house door of said parish of East Baton Rouge, for cash, without the benefit of appraisement, on Saturday, the sixth day of January, it being the first Saturday of said month, in the year
19 of our Lord one thousand eight hundred & sixty-six, (A. D. 1866,) at 11 o'clock a. m. of said day; and at the time and place above designated, after complying with all the formalities of law, such as reading aloud the public advertisement, terms of sale, and the parish recorder's certificate of mortgages, &c., and having exposed the same to public sale according to law, William S. Pike, of the city of New Orleans, became the purchaser thereof for the sum and price of forty-six thousand seven hundred and twenty-five ($46,725.00) dollars, which I do hereby acknowledge to have received, as follows: under the instruc-

tions of the plaintiff, and with the consent of the purchaser, viz, twenty ($20,000.00) in cash, and in three notes each for the sum of eight thousand three hundred and eighty $\frac{50}{100}$ ($8,380.50) dollars, bearing ten per cent. interest per annum, the rate of interest of the judgment from this date, payable at the banking-house of Pike Lapeyre & Brother, in the
20 city of New Orleans, to the order of the plaintiff, Mrs. Eliza C. Johnson, at one, two, and three years from date; with the agreement made by the parties that said purchaser, Wm. S. Pike, reserves the right to pay said notes at any time before maturity at the elected domicil, and with the explicit understanding that, upon the payment and liquidation of said notes, the value of the United States currency is to be estimated at no greater rate of depreciation than as compared with the comparative rate of gold and United States currency on the 1st day of February, A. D. 1866.

The adjudication and sale to be recorded in the office of the parish recorder of the parish of East Baton Rouge, in the book of mortgages, and the vendor's mortgage to be retained on the property adjudicated until the full and final payment of the above-described notes, to be paraphed by the recorder to identify them with said property adjudicated as aforesaid, and not to be sold or alienated to the preju-
21 dice of the plaintiff, the holder thereof.

The balance of the purchase-money, viz, the sum of fifteen hundred and eighty-two $\frac{20}{100}$ ($1,582.20) dollars, to be paid to Hill and Markham by said Pike, the purchaser.

Now, therefore, know all men by these presents that I, the said sheriff, do, in consideration of the premises and by virtue of the act in such case made and provided, grant, bargain & sell, assign and set over, to the said Wm. S. Pike, and to his legal and lawful heirs and assigns, all the above-described "Richland Plantation," and all the right, title, interest, and demand which the said Ac'l'y Perkins, J. M. Williams, & Wm. S. Pike, on the 3rd day of August, A. D. 1861, or at any time since, had in or to the said "Richland Plantation," or any part thereof, to hold the same to the said Wm. S. Pike and his legal heirs and assigns forever.

In witness whereof, I have hereunto set my hand and seal, in the city of Baton Rouge, this sixth day of January, in the year of our Lord
22 one thousand eight hundred and sixty-six, (A. D. 1866.)

[SEAL.] (Signed) E. A. COUSINARD,
Sheriff.

Sealed & delivered in the presence of—
(Signed) F. M. YOUNG.
(") J. A. ALLAIN.

STATE OF LOUISIANA,
Parish of East Baton Rouge:

RECORDER'S OFFICE.

I do certify the foregoing sheriff's deed to be recorded in this office in book U, folio 195, of notarial acts, and of record in book T, folio 105, of conventional mortgages; and I further certify that the United States internal-revenue-stamp duty of forty-seven dollars has been hereunto annexed, paid, and cancelled.

Given under my hand and seal of office, at Baton Rouge, this 6th day of January, A. D. 1866.

[SEAL.] (Signed) JOHN O'CONNOR,
Recorder.

[Int. rev., two dollars, stamp, U. S.] [Int. rev., five dolla., stamp, U. S.] [Int. rev., ten dollars, stamp, U. S.] [Int. rev., ten dollars, stamp, U. S.] [Int. rev., ten dollars, stamp, U. S.] [Int. rev., ten dollars, stamp, U. S.]

23 *Citation in warranty to Eliza C. Johnson.—Issued Decr. 2d, 1871.*

The President of the United States of America to the marshal of the district of Louisiana, greeting:

MRS. MARY P. EVANS & WM. R. EVANS
vs.
WM. S. PIKE. } No. 6494.

You are hereby commanded to summon Eliza C. Johnson, citizen of the State of , to comply with the demand of Wm. S. Pike, citizen of the State of , contained in the answer and call in warranty, of which a copy accompanies this citation, or to deliver her answer to the same in the office of the clerk of the circuit court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans, in ten days after service hereof, or judgment will be rendered against her by default, which delay is increased one day for every ten miles the defendant's residence is distant from New Orleans, the place where the court is held; and that you make due return hereof on the first Monday of January, 1872.

24 Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 2nd day of December, A. D. one thousand eight hundred and seventy-one, and the 96th year.

[SEAL.] (Signed) F. A. WOOLFLEY, *Clerk*,
(") By F. B. VINOT, *Dy. Clerk.*

Marshal's return.

Received Decr. 4, 1871, by the U. S. marshal, and, after diligent search and inquiry, the within Eliza C. Johnson could not be found.

New Orleans, January 1st, 1872.

(Signed) S. W. REED,
Dy. U. S. Marshal.

Citation in warranty to Ackley Perkins.—Issued Decr. 2nd, 1871.

The President of the U. S. of America to the marshal of the District of Louisiana, greeting:

MRS. MARY P. EVANS & WM. R. EVANS
vs.
WM. S. PIKE. } No. 6494.

25 You are hereby commanded to summon Ackley Perkins, citizen of the State of , to comply with the demand of William S. Pike, citizen of the State of , contained in the answer & call in warranty, of which a copy accompanies this citation, or to deliver his answer to the same, in the office of the clerk of the circuit court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans, in ten days after service hereof, or judgment will be rendered against him by default; which delay is increased one day for every ten miles the defendant's residence is distant from New Orleans,

the place where the court is held; and that you make due return hereof on the first Monday of January, 1872.

Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 2d day of December, A. D. one thousand eight hundred and seventy-one, and the 96th year.

[SEAL.] (Signed) F. A. WOOLFLEY, *Clerk.*
" By F. B. VINOT, *Dy. Clerk.*

26 *Marshal's return.*

Received by the U. S. marshal, Dec'r 4, 1871, (and no return made.)

Alias citation to Mrs. Eliza C. Johnson.—Issued March 20th, 1872.

The President of the U. S. of America to the marshal of the district of Louisiana, greeting:

MRS. MARY P. EVANS AND WM. R. EVANS
vs.
WM. S. PIKE. } No. 6494.

You are hereby commanded to, as you have heretofore been, *to* summon Eliza C. Johnson, citizen of the State of , to comply with the demand of William S. Pike, citizen of the State of , contained in the answer and call in warranty, of which a copy accompanies this alias citation, or to deliver her answer to the same, in the office of the clerk of the circuit court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans, in ten days after
27 service hereof, or judgment will be rendered against her by default; which delay is increased one day for every ten miles the defendant's residence is distant from New Orleans, the place where the court is held; and that you make due return hereof on the first Monday of May, 1872.

Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 20th day of March, A. D. one thousand eight hundred and seventy-two, and of the Independence of the United States of America the 96th year.

[SEAL.] (Signed) F. A. WOOLFLEY, *Clerk.*

Marshal's return.

Received, March 21st, 1872, by the U. S. marshal, and on the 27th day of March, 1872, served a copy hereof, with the answer & call in warranty accompanying, on Mrs. Eliza C. Johnson, by handing the same to Willie Brady, her grandson, in person, at Baton Rouge, La., at the domicil of said Mrs. Johnson, she being absent at the time, the said
28 Brady being a *a* person over the age of 14 years & resid'n*g* at the domicil of Eliza C. Johnson.

Distance to N. O., 130 miles.

(Signed) HENRY SCHERTEN,
Dy. U. S. Marshal.

Alias citation to Eliza C. Johnson.—Issued April 10th, 1872.

The President of the U. S. of America to the marshal of the district of Louisiana, greeting:

MRS. MARY P. EVANS AND WM. R. EVANS
vs.
WILLIAM S. PIKE. } No. 6494.

You are hereby commanded, as you have heretofore been, to summon Eliza C. Johnson to comply with the demand of Wm. S. Pike, contained in the answer and call in warranty, of which a copy accompanies this alias citation, or to deliver her answer to the same, in the office of the clerk of the circuit court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans, in ten days after service hereof, or judgment will be rendered against her by default;
29 which delay is increased one day for every ten miles the defendant's residence is distant from New Orleans, the place where the court is held; and that you make due return hereof on the first Monday of May, 1872.

Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 10th day of April, A. D. one thousand eight hundred and seventy-two, and of the Independence of the United States of America the 96th year.

[SEAL.] (Signed) F. A. WOOLFLEY, *Clerk.*

Marshal's return.

Received April 10th, 1872, by the U. S. marshal, and on the same day, month, and year, served a copy hereof, with the answer and call in warranty accompanying, on Mrs. Eliza C. Johnson, by handing the same to her in person at No. 314 Canal st., in this city.

New Orleans, April 11, 1872.

(Signed) S. W. REED,
Dy. U. S. Marshal.

30 *Alias citation to Ackley Perkins.—Issued April 25th, 1872.*

The President of the U. S. of America to the marshal of the district of Louisiana, greeting:

MRS. MARY P. EVANS AND WM. R. EVANS
vs.
WILLIAM S. PIKE. } No. 6494.

You are hereby commanded, as you have heretofore been, to summon Ackley Perkins to comply with the demand of William S. Pike, contained in the answer and call in warranty, of which a copy accompanies this alias citation, or to deliver his answer to the same in the office of the clerk of the circuit court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans, in ten days after service hereof, or judgment will be rendered against him by default, which delay is increased one day for every ten miles the defendant's residence is distant from New Orleans, the place where the court
31 is held. And that you make due return hereof on the first Monday of June, 1872.

Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 25th day of April, A. D. one thousand eight hundred and seventy-two, and of the Independence of the United States of America the 96th year.
[SEAL.] (Signed) F. A. WOOLFLEY, *Clerk.*

Marshal's return.

Received April 25th, 1872, by the U. S. marshal (and no return made.)
Memorandum: (Ackley Perkins lives 4 miles from St. Francisville. Lee Collins, & Leake, att'ys, St. Francisville, for directions.)

Hearing of cause & empannelling jury.—Extract from the minutes April term, 1872.

NEW ORLEANS, *Friday, May 3d*, 1872.

Court met pursuant to adjournment. Present, Hon. E. H. Durell, district judge.

MRS. MARY P. EVANS & WM. R. EVANS
vs.
WILLIAM S. PIKE. } No. 6494.

32 This cause came up for trial.
Wm. Grant for plaintiffs.
Hays & New for defendant.
Randolph, Singleton & Browne, for Mrs. Johnson, called in warranty.
When the following jurors were called and sworn to try the issue:

1. Pierre Soniat.
2. A. H. Duhart.
3. Wm. Nicholson.
4. Geo. Kernon.
5. E. R. Poole.
6. T. Bailly Blanchard.
7. S. J. Keith.
8. Casimir Gardaune.
9. F. Rickert.
10. Jno. Burrows.
11. Jos. Paillot.
12. I. B. Ludwick.

And after hearing the pleadings & evidence the cause is continued till to-morrow at 11 a. m.

Plea of prescription.—Filed May 3d, 1872.

U. S. circuit court.

MRS. MARY P. EVANS
vs.
WILLIAM S. PIKE. } No. 6494.

Defendants, by undersigned counsel, pleads the prescription of one, three, & five years, to demand of plaintiff, and prays the same may be dismissed.
(Signed) HAYS & NEW,
Atty's for Deft.

33 *Answer of Mrs. Johnson to call in warranty.—Filed May 3d*, 1872.

MRS. MARY P. EVANS & AL.
vs.
WILLIAM S. PIKE. } No. 6494.

Mrs. Eliza C. Johnson, for answer to the call in warranty in the case of vs. W. S. Pike, denies all the allegations of the plaintiff's

petition, except as admitted, and denies that, under any circumstances, *that* the charge be bound in warranty, and, further answering, says that, as far back as 1834, William Anderson and others sold the property in question to the husband of the said defendant in warranty, &c., another joint purchaser, and that they sold the said property to one Howell, who afterwards sold it to I. & H. Perkins, and that the said title was always good in any of the aforesaid owners of the same.

That the purchase-money of the said property had never been paid, and that for the payment of the same she held the vendor's lien in right of her said husband, and whom she had legal authority to represent;
34 and that to foreclose the mortgage on said estate, & to collect her said notes, she brought suit against said I. & H. Perkins, No. 1311 of the docket of the seventh judicial dist. court, in West Feliciana.

That said H. Perkins and J. Perkins confessed on the cause of action, and judgment was accordingly rendered; and she alleges that the title of the said Perkins to said property was complete and perfect, and that right of mortgage was good & valid.

Defendant in warranty admits that she issued her execution & that the said property was sold in her suit against I. & H. Perkins, and that a good title to the same existed in defendants at the time of the sale, and that said I. & H. Perkins, and also Ackley Perkins, knew that the title of the defendant in said suit was good, and at a sale of said property Ackley Perkins became the purchaser, on the 5th day of August, 1861, on a twelve months' bond, & gave as his security for the price a bond signed by said Ackley Perkins, principal, and J. M. Williams & W. S. Pike, as securities.

Defendant avers that the said Ackley Perkins, she has since
35 learned, was a mere man of straw interposed by the said I. & H. Perkins to represent them, & to try and purchase the property, and to impose on the securities the necessity to pay for it, and with the design in the mean time of making a transfer of it without consideration to some of their kin, and they consummated this design by procuring a deed of gift from said Ackley to the present plaintiff but a few weeks after the purchases was effected under the said twelve months' bond.

Then the said W. S. Pike was called on to pay this defendant, which he did so; but she avers that she is not bound to warrant the title, for that it was good at the time it was sold and passed as good title to the said Perkins, and if it afterwards became bad because so in consequ'nce of a fraudulent sale made by the said Ackerly to said plaintiff, & if the said Pike has not a good title, it arises from proceedings subsequent to the sale; for at the time of the adjudication to the said Ackerly the title of the defendant in execution was perfect, and
36 if the said Pike's title is bad, it arises from his own laches, and not from the defect in title of the property sold to the said Ackerly on the 12-month bond.

But defendant herein says that, by the payment of the said twelves-months' bond by said Pike, as security, he became subrogated to all of the rights of this defendant against said Ackley to said property, & as the twelve-months' bond contained a mortgage to secure the payment of the price at which said property was adjudicated in favor of this defendant, the gift of said Ackley was subject to said mortgages, and any sale by said Ackly, or any gift made by him of said property so purchased as aforesaid, was made subject to the mortgage of the said Pike, which resulted to him & to which he was subrogated by reasons of his payment of said bond, and that plaintiff can under no circum-

stances have any claims to said property until she shall have re-imbursed the said Pike all the money, principal & interest, that he has paid on said twelve-months' bond.

(Signed) RANDOLPH, SINGLETON & BROWNE,
For Eliza C. Johnson.

37 *Hearing and continuance.—Extract from the minutes May* 6, 1872.

MRS. MARY P. EVANS AND WM. R. EVANS
vs.
WM. S. PIKE. } No. 6494.

This cause was resumed, &, after hearing further argument, the court appointed T. B. Blanchard foreman of the jury, ordered the cause to be continued till to-morrow at 11 a. m., & cautioned the jury not to converse with any one, even among themselves, concerning the subject-matter before them.

Hearing and submission & verdict.—Extract from the minutes May 7, 1872.

MRS. MARY P. EVANS & WM. R. EVANS
vs.
WM. S. PIKE. } No. 6494.

This cause was resumed before the court and jury, and after receiving a charge from his honor, the jury retired to consider on their verdict.

38 After due deliberation they returned into court and delivered the following verdict, to wit:

We, the jury, find verdict for plaintiff, allowing her twenty-five hundred dollars rent per annum since the sheriff's sale, and costs, charging her with the refunding of the taxes paid by defendant since the sheriff's sale to defendant, discharging Mrs. Eliza C. Johnson from any liabilities.

New Orleans, May 7th, 1872.

(Signed) T. BAILEY BLANCHARD,
Foreman.

Whereupon it is ordered that the same be recorded.

Judgment.—Extract from the minutes, May 7th, 1872.

MRS. MARY P. EVANS AND WM. R. EVANS
vs.
WM. S. PIKE. } No. 6494.

By reason of the verdict and in accordance therewith, it is ordered, adjudged, and decreed that the plaintiff, Mrs. Mary P. Evans, wife of Wm. R. Evans, and by her husband duly assisted, be recognized
39 as the rightful owner of a certain tract of land or plantation, known as "Richland Plantation," situate in the parish of East Baton Rouge, containing 1,911 acres, more or less, with all the buildings and improvements thereon, and that the defendant, William S. Pike, now holding said property, do immediately restore the same to the possession of the plaintiff.

It is further ordered and decreed that said Mrs. Evans recover from Wm. S. Pike, rent for said property at the rate of ($2,500) twenty-five

petition, except as admitted, and denies that, under any circumstances, *that* the charge be bound in warranty, and, further answering, says that, as far back as 1834, William Anderson and others sold the property in question to the husband of the said defendant in warranty, &c., another joint purchaser, and that they sold the said property to one Howell, who afterwards sold it to I. & H. Perkins, and that the said title was always good in any of the aforesaid owners of the same.

That the purchase-money of the said property had never been paid, and that for the payment of the same she held the vendor's lien in right of her said husband, and whom she had legal authority to represent;

34 and that to foreclose the mortgage on said estate, & to collect her said notes, she brought suit against said I. & H. Perkins, No. 1311 of the docket of the seventh judicial dist. court, in West Feliciana.

That said H. Perkins and J. Perkins confessed on the cause of action, and judgment was accordingly rendered; and she alleges that the title of the said Perkins to said property was complete and perfect, and that right of mortgage was good & valid.

Defendant in warranty admits that she issued her execution & that the said property was sold in her suit against I. & H. Perkins, and that a good title to the same existed in defendants at the time of the sale, and that said I. & H. Perkins, and also Ackley Perkins, knew that the title of the defendant in said suit was good, and at a sale of said property Ackley Perkins became the purchaser, on the 5th day of August, 1861, on a twelve months' bond, & gave as his security for the price a bond signed by said Ackley Perkins, principal, and J. M. Williams & W. S. Pike, as securities.

Defendant avers that the said Ackley Perkins, she has since

35 learned, was a mere man of straw interposed by the said I. & H. Perkins to represent them, & to try and purchase the property, and to impose on the securities the necessity to pay for it, and with the design in the mean time of making a transfer of it without consideration to some of their kin, and they consummated this design by procuring a deed of gift from said Ackley to the present plaintiff but a few weeks after the purchases was effected under the said twelve months' bond.

Then the said W. S. Pike was called on to pay this defendant, which he did so; but she avers that she is not bound to warrant the title, for that it was good at the time it was sold and passed as good title to the said Perkins, and if it afterwards became bad because so in consequ'nce of a fraudulent sale made by the said Ackerly to said plaintiff, & if the said Pike has not a good title, it arises from proceedings subsequent to the sale; for at the time of the adjudication to the said Ackerly the title of the defendant in execution was perfect, and

36 if the said Pike's title is bad, it arises from his own laches, and not from the defect in title of the property sold to the said Ackerly on the 12-month bond.

But defendant herein says that, by the payment of the said twelves-months' bond by said Pike, as security, he became subrogated to all of the rights of this defendant against said Ackley to said property, & as the twelve-months' bond contained a mortgage to secure the payment of the price at which said property was adjudicated in favor of this defendant, the gift of said Ackley was subject to said mortgages, and any sale by said Ackly, or any gift made by him of said property so purchased as aforesaid, was made subject to the mortgage of the said Pike, which resulted to him & to which he was subrogated by reasons of his payment of said bond, and that plaintiff can under no circum-

stances have any claims to said property until she shall have re-imbursed the said Pike all the money, principal & interest, that he has paid on said twelve-months' bond.

(Signed) RANDOLPH, SINGLETON & BROWNE,
For Eliza C. Johnson.

37 *Hearing and continuance.—Extract from the minutes May* 6, 1872.

MRS. MARY P. EVANS AND WM. R. EVANS
vs.
WM. S. PIKE. } No. 6494.

This cause was resumed, &, after hearing further argument, the court appointed T. B. Blanchard foreman of the jury, ordered the cause to be continued till to-morrow at 11 a. m., & cautioned the jury not to converse with any one, even among themselves, concerning the subject-matter before them.

Hearing and submission & verdict.—Extract from the minutes May 7, 1872.

MRS. MARY P. EVANS & WM. R. EVANS
vs.
WM. S. PIKE. } No. 6494.

This cause was resumed before the court and jury, and after receiving a charge from his honor, the jury retired to consider on their verdict.

38 After due deliberation they returned into court and delivered the following verdict, to wit:

We, the jury, find verdict for plaintiff, allowing her twenty-five hundred dollars rent per annum since the sheriff's sale, and costs, charging her with the refunding of the taxes paid by defendant since the sheriff's sale to defendant, discharging Mrs. Eliza C. Johnson from any liabilities.

New Orleans, May 7th, 1872.

(Signed) T. BAILEY BLANCHARD,
Foreman.

Whereupon it is ordered that the same be recorded.

Judgment.—Extract from the minutes, May 7th, 1872.

MRS. MARY P. EVANS AND WM. R. EVANS
vs.
WM. S. PIKE. } No. 6494.

By reason of the verdict and in accordance therewith, it is ordered, adjudged, and decreed that the plaintiff, Mrs. Mary P. Evans, wife of Wm. R. Evans, and by her husband duly assisted, be recognized

39 as the rightful owner of a certain tract of land or plantation, known as "Richland Plantation," situate in the parish of East Baton Rouge, containing 1,911 acres, more or less, with all the buildings and improvements thereon, and that the defendant, William S. Pike, now holding said property, do immediately restore the same to the possession of the plaintiff.

It is further ordered and decreed that said Mrs. Evans recover from Wm. S. Pike, rent for said property at the rate of ($2,500) twenty-five

hundred dollars per annum, from the 6th day of January, 1866, up to the time the property shall be restored to her.

It is ordered and decreed that all taxes paid by the said Pike on the property since his acquisition of the same, be refunded to him by Mrs. Mary P. Evans.

It is further ordered & decreed that upon the call in warranty judgment be entered in favor of Mrs. Eliza C. Johnson, dismissing said call with costs.

And it is further ordered that defendant Pike pay costs of suit.

40 *Rule and grounds for new trial.—Entered & filed May* 8, 1872.

Circuit court of the United States, fifth circuit & district of Louisiana, April term, 1872.

NEW ORLEANS, *Wednesday, 8th day of April*, 1872.

Court met pursuant to adjournment. Present. Hon. E. H. Durell, district judge.

MARY P. EVANS ET AL.
vs.
WM. S. PIKE. } No. 6494.

On motion of Hays & New of counsel for Wm. S. Pike, it is ordered that plaintiff show cause on Saturday, 11th instant, at 11 a. m., why a new trial should not be granted, for the reason that the verdict of the jury is opposed to and in disregard of the law, as expounded by his honor, the judge, in his charge, and in violation of the law given by his honor at the request of defendant's and plaintiff's counsel.

2d. It is in opposition to the admitted facts.

3d. For the reason there is no evidence on which to base a ver-
41 dict for rents; and further, that by law a possessor in good faith, like defendant, is not liable for rents.

Marshal's return.

Received May 9th, 1872, by the U. S. marshal, and on the same day, month, and year, served a copy of within rule and grounds on Wm. Grant, named herein, by handing the same to him in person.

New Orleans, May 10, 1872.

(Signed) S. W. REED,
Dy. U. S. Marshal.

Hearing and submission of rule.—Extract from the minutes May 11*th*, 1872.

MRS. MARY P. EVANS ET AL.
vs.
WM. S. PIKE. } No. 6494.

The rule for a new trial taken by defendant was called—
Hays & New for plaintiff in rule;
Wm. Grant for defendant in do.;
When, after hearing counsel, the court took time to consider.

42 *Order: New trial granted.—Extract from the minutes May 29th, 1872.*

MRS. MARY P. EVANS ET AL. *vs.* WM. S. PIKE. } 6494.

Ordered, that a new trial be granted in this cause, with leave to the plaintiff to have the order set aside, upon her re-imbursing to the defendant the amount by him paid on the 12-months' bond, and upon her remitting all rents allowed by the jury up to the time of the institution of the suit.

Amended & supplemental answer & order.—Filed August 29th, 1872.

U. S. circuit court.

MRS. MARY P. EVANS AND WM. S. EVANS *vs.* WM. S. PIKE. } No. 6494.

Now comes the defendant, Wm. S. Pike, and, for amended and supplemental answer to the petition and supplemental petition of plaintiffs, says:

43 That the donation relied on by plaintiffs set forth in their supplemental petition is null and void; that said donation was a purely gratuitous one, and was made in fraud of the donor's creditors; as, at the time of making said donation, the said donor, who was at the time a debtor of defendant, had not, over and above the amount of his debts, more than twice the amounts of property passed by said gratuitous donation; that said donation was made in fraud of the rights of defendant, who was a creditor of the donor at the date of said donation.

Second. That the said donation is null and void, because it divested the donor of all his property; that donations inter vivos shall in no case divest the donor of all his property; he must reserve for himself enough for subsistence; if he does not do it, the donation is null for the whole.

Wherefore, petitioner prays leave to file this supplemental and amended answer; that the suit of plaintiff be dismissed at their costs; and for all general relief.

(Signed) HAYS & NEW, *Attys. for Deft.*

44 *Order.*

Let this amended and supplemental answer be filed.
August 29th, 1872.
(Signed) W. B. WOODS, *Judge.*

Hearing and continuance of cause.—Empannelling jury.

November term, 1872.

NEW ORLEANS, *Thursday, March* 13, 1873.

Court met pursuant to adjournment. Present, the Hon. W. B. Woods, circuit judge.

U. S. circuit court.

MARY P. EVANS ET AL.
vs.
WM. S. PIKE. } No. 6494.

This cause was called for trial—Wm. Grant & A. C. Story for plaintiffs; Hays & New for defendant—when the following jurors were called and sworn to try the issue:

1. A. Cazelar.
2. Alf. Davis.
3. V. Boutee.
4. Wm. McDuff.
5. Wm. Carr.
6. S. Esnard, jr.
7. Geo. Belot.
8. A. Delisle.
9. Wm. Joyce.
10. Jules Dupre.
11. P. Casanave.
12. Clovis Gellott.

45 And the jury being complete, the trial proceeded, and after hearing the pleadings, evidence, & the opening argument on behalf of the plaintiff, the cause is continued till to-morrow at 11 a. m., and the jurors were cautioned not to converse with any one, even among themselves, on the subject-matter before them.

Submission of cause to jury.—Extract from the minutes March 14th, 1873.

MARY P. EVANS ET AL.
vs.
WM. S. PIKE. } No. 6494.

This cause was resumed, the jurors sworn, and counsel engaged being all present—

When, after hearing further argument and receiving a charge from the court, Wm. McDuff was appointed foreman of the jury, & the cause submitted to them.

And it now being 4 p. m., his honor ordered the court to be adjourned & directed the marshal to keep the jury in charge, & in case
46 of an agreement they shall deliver to the clerk a sealed verdict, and be present next morning at 11 a. m., at the opening and reading of the same.

Verdict and judgment.—Extract from the minutes March 15th, 1873.

MARY P. EVANS ET AL.
vs
WM. S. PIKE. } No. 6494.

The jury having delivered a sealed verdict, and being now all present in open court, the same was opened and read by the clerk, and is as follows, viz:

Verdict in favor of plaintiff for "Richland Plantation," and hundred (100) acre lot within described, and that defendant shall pay twenty-five hundred ($2,500) dollars per year from legal demand.

New Orleans, March 14th, 1873.

(Signed) WM. McDUFF,
Foreman.

Whereupon it is ordered that the same be recorded.

47 *Judgment.*—(*Extract from the minutes, March 15th*, 1873.)

U. S. circuit court.

MARY P. EVANS ET AL. *vs.* WM. S. PIKE. } No. 6494.

By reason of the verdict and in accordance therewith, it is ordered, adjudged, and decreed, that the plaintiff, Mrs. Mary P. Evans, wife of Wm. S. Evans, and by her husband duly assisted, be recognized as the rightful owner of the Richland Plantation, situate in the parish of East Baton Rouge, containing 1,730 arpents more or less, with all the buildings and improvements thereon, and also of one hundred acres of land purchased by J. & H. Perkins from Phœbe Anderson.

And that the deft., W. S. Pike, now holding said property, do immediately restore the same to the possession of the plaintiff.

It is further ordered and decreed that said Mrs. Evans recover from said W. S. Pike twenty-five hundred ($2,500) dollars per year
48 from legal demand, as rent for said property up to the time the property be restored to her.

It is further ordered that the defendant, Pike, pay costs of suit.

Rule and grounds for new trial.—(*Filed March 19th*, 1873.)

U. S. circuit court.

MARY P. EVANS *vs.* WM. S. PIKE. } No. 6494.

On motion of Hays & New, of counsel for Wm. S. Pike, it is ordered that plaintiff and Mrs. E. C. Johnson, called in warranty, show cause on Saturday, 22d inst., at 11 o'clock a. m., why a new trial should not be granted herein, for the reason that the court erred in giving the law to the jury, in this:

That the jury should find the deed of donation void, if they found that Ackley Perkins had conveyed the land in question to his neice, the plaintiff, for the purpose of defrauding Pike, and if it had
49 that effect; and that the conveyance in question could have no effect whatever on Pike, because the land remained subject to his claims; when, by the certificate of the recorder of mortgages of the parish of East Baton Rouge, Pike never had a lien on the land in question; and in charging the jury that the donation could not operate as a fraud on Pike, as his rights were not affected by it.

2d. That the court erred in giving the law, "that another defence of defendant, that Ackley Perkins could not make this donation because he had no other property, and that it was void, was a defence which could not be set up by this defendant. Whereas said defence being against an act prohibited by law, can be set up at any time when an action is brought to enforce the same.

3d. That the court erred in charging the jury that the plaintiff in this case stands in the position of a third possessor of the immov-
50 able property mortgaged or subject to the privilege.

4th. That the court erred in charging the jury that the defend-

ant must prove that the sheriff seized the property in question; whereas, when the return of the sheriff shows that the property was seized, the burden of proof is in the party attacking the deed, to show that it was not.

5th. That the court erred in instructing the jury that an "imperfection" arising from a want of seizure by the sheriff of the property in question was not cured by five years' possession by defendant, because the only objection urged by plaintiff in attacking the deed, was that it did not state in terms that the sheriff seized & "took possession" of the property, so that the defect was in the return made by the sheriff, not in the fact itself.

6th. That the court in refusing to give the charge asked by defendant, "If the jury finds that Pike was a bona-fide purchaser of the property in dispute, and that he paid the mortgage which was an encum-
51 berance upon the property at the time of sale, then, should you find a verdict for the plaintiff, you shall also find that the plaintiff shall refund to Pike the amount so paid by him with interest, before taking possession of said property."

7th. The court erred in refusing to charge the jury as requested by defendants, "If proceeds arising from property irregularly sold at sheriff's sale have been applied to the payment of the owner's debts, he cannot recover the property, unless he repays the purchaser the amount."

8th. The court erred in refusing to charge the jury, as requested by defendant, "If the jury find that Wm. S. Pike was a surety on a bond of Ackley Perkins, given by said Perkins for the plantation now in contest in this suit, prior to the act of donation to plaintiff; and that subsequently Pike paid the full amount of said bond with interest, then the jury is instructed that Pike was a creditor of Ackley Perkins at the
52 time the said donation was made to plaintiff," and in adding that "I give you that instruction, reminding you, however, that in order to make out the fact that Pike was a creditor to have any effect in this case, the defendant must also show that this conveyance by Ackley Perkins to Mrs. Evans, the plaintiff in this case, had the effect of defrauding him, he being a creditor."

9th. The court erred in refusing to charge the jury, as requested by defendant, "If the jury find that the title relied on by plaintiff is that of donation from Ackley Perkins, then it is a gratuitous contract, and the jury is instructed that when a contract is purely gratuitous, it shall be presumed to have been made in fraud of creditors, if at the time of making it the debtor had not over and above the amount of his debts more than twice the amount of the property passed by such gratuitous contracts."

And in modifying the above, "But if the jury is satisfied that
53 this conveyance did not have the effect of defrauding Pike in any way, if his claim was still a lien upon the land, notwithstanding this conveyance, I instruct you that he was not defrauded by it."

10th. The court erred in charging the jury "that the simple conveyance from Ackley Perkins to Mrs. Evans did not affect the lien that Pike had upon the land, and, therefore, was not a fraud upon his rights."

11th. The court erred in refusing to charge the jury, as requested by defendant, "that the twelve-months' bond not being recorded, there was no lien upon the land; and that Ackley Perkins conveyed the plantation and slaves unincumbered by any mortgage whatever."

12. The donation relied on by the plaintiff is void and of no effect, because not passed before a notary public and two witnesses.

13. Since the trial of the cause defendant has discovered evidence im-

portant to the cause, which he could not with due diligence have
54 obtained before, as set forth in affidavit of defendant annexed and made part of this motion.

14th. That the court erred in dismissing defendant's claim against the party called in warranty without a hearing or written application.

U. S. circuit court.

MARY P. EVANS
vs.
WM. S. PIKE. } No. 6494.

Wm. S. Pike, being sworn, says that he has learned since the trial of this cause that the jury brought in a verdict for the plaintiff to recover the land in controversy because they understood the instruction of the court to be that plaintiff must refund the money paid by Pike for the land in controversy, before she could take the same; that if plaintiff can take the land without refunding said money, they would have considered the transaction of giving the land to plaintiff by Ackley Perkins as fraudulent and void, and made with intent to deceive and defraud Pike, and they would have found a verdict for defendant.

55 (Signed) WM. S. PIKE.

Sworn to and subscribed before me this 19th day of March, 1873.
(Signed) W. L. EVANS,
2d Justice Peace, Parish of Orleans.

Continuance of cause by consent.—(*Extract from the minutes, March 22d,* 1873.)

U. S. circuit court.

MARY P. EVANS ET AL.
vs.
WM. S. PIKE. } No. 6494.

By consent of counsel, the rule for a new trial is continued till the 24th, and the time for filing bills of exceptions extended till the 25th instant, at 11 a. m.

Continuance of cause by consent.—(*Extract from the minutes, March 24th,* 1873.)

U. S. circuit court.

MARY P. EVANS
vs.
WM. S. PIKE. } No. 6494.

By consent of counsel, the rule for a new trial is continued till to-mor row, at 11 a. m.

56 *Continuance of rule.*—(*Extract from the minutes, March 25th,* 1873.)

U. S. circuit court.

MARY P. EVANS
vs.
WM. S. PIKE. } No. 6494.

For want of time the rule for a new trial is continued till the day of May, 1873, & the time for filing the bills of exceptions extended to the time of hearing the rule for a new trial.

Order rule fixed.—(Extract from the minutes, February 16, 1874.)

U. S. circuit court.

MARY P. EVANS
vs.
WM. S. PIKE. } No. 6494.

On motion of Wm. Grant, esq., it is ordered that the rule for a new trial herein be re-assigned for the 21st instant, at 11 a. m., and that defendant be notified thereof.

Notice of trial.—(Issued February 16th, 1874.)

57 Circuit court of the United States for the fifth judicial circuit and district of Louisiana.

U. S. circuit court.

MRS. MARY P. EVANS ET AL.
vs.
WILLIAM S. PIKE. } No. 6494.

You are hereby notified that the rule for a new trial in this case is re-assigned for trial for Saturday, the 21 day of February, A. D. 1874, at 11 o'clock a. m.

By order of the court.

Witness my hand and seal of the said court, at New Orleans, this 16th day of February, A. D. 1874.

[SEAL.] (Signed) F. B. VINOT,
D'y Clerk.

To RANDOLPH, SINGLETON & BROWNE, esqrs.
" HAYS and NEW, esqrs.

Marshal's return.

Received Feb. 18th, 1874, by the U. S. marshal, and on same day, month, and year served a copy of within notice of trial on the within named, in the following manner: on Randolph, Singleton & Browne, by handing the same to C. B. Singleton, and on Hayes & New, by handing same to J. H. New.

New Orleans, Febr'y 19th, 1874.

58 (Signed) S. W REED,
D'y U. S. Marshal.

Submission of rule for new trial.—(Extract from the minutes, February 21st, 1874.)

U. S. circuit court.

MRS. MARY P. EVANS ET AL.
vs.
WILLIAM S. PIKE. } No. 6494.

The rule for a new trial in this case was called.

Hays & New for plaintiff in rule.

Wm. Grant, W. M. Randolph, Singleton & Browne, for defendant in rule.

When, after hearing a'gument, the court took time to advise.

Order.—New trial refused.—(Extract from the minutes, March 23d, 1874.)

MRS. MARY P. EVANS ET AL.
vs.
WILLIAM S. PIKE. } No. 6494.

For reasons orally assigned by the court, it is ordered that a new trial be refused in this cause, with costs.

59 *Motion & order for time to file bill of exceptions.—(Extract from the minutes, March 23, 1874.)*

U. S. circuit court.

MRS. MARY P. EVANS
vs.
WILLIAM S. PIKE. } No. 6494.

On motion of Hays & New, attorneys for defendant, it is ordered that defendant be allowed till the 29th inst. to prepare bills of exception herein.

Judgment from judgment docket.—(November term, 1873.)

NEW ORLEANS, *Tuesday, March 24th*, 1873.

Court met pursuant to adjournment. Present: Hon. W. B. Woods, circuit judge.

U. S. circuit court.

MRS. MARY P. EVANS
vs.
WILLIAM S. PIKE. } No. 6494.

By reason of the verdict and in accordance therewith, it is ordered, adjudged, and decreed that the plaintiff, Mrs. Mary P. Evans, wife of Wm. S. Evans, and by her husband duly assisted, be recognized
60 as the rightful owner of the Richland Plantation, situate in the parish of East Baton Rouge, containing 1,730 arpents, more or less, with all the buildings and improvement thereon, and also of one hundred acres of land purchased by J. & H. Perkins from Phœbe Anderson.

And that the defendant, W. S. Pike, now holding said property, do immediately restore the same to the possession of the plaintiff.

It is further ordered and decreed that said Mrs. Evans recover from said W. S. Pike twenty-five hundred dollars ($2,500) per year from legal demand, as rent for said property up to the time the property be restored to her.

It is further ordered that the defendant, Pike, pay costs of suit.

Judgment rendered March 15th, 1873.

Judgment signed March 24th, 1874.

(Signed) W. B. WOODS, *Judge.*

Bill of exceptions No. 1.—Filed March 26th, 1874.

U. S. circuit court.

MARY P. EVANS *vs.* WM. S. PIKE. } No. 6494.

Be it remembered that on the trial of this case, on the 14th day of March, 1873, after argument of counsel addressed to the jury had
61 closed, the court in charging the jury, in stating that the defendant had set up in his answer that the donation relied on by plaintiff was null and void, because it divested the donor of all his property; that donations, inter vivos, shall in no case divest the donor of all his property; that he must reserve for himself enough for subsistence; if he does not, the donation is null for the whole, charged the jury in the words following:

"And their defence is that this Ackley Perkins owned no other property, and that therefore he could not make this donation which conveyed all his property, and it is void. The court instructs you that this is a defence which this defendant is not authorized to set up, and you may lay that out of consideration."

And thereupon, and then and there, in the presence of the jury, and before they had retired, the counsel for the defendant excepted, and tenders this bill of exceptions for signature and seal, this 26th day of March, A. D. 1874.

(Signed) W. B. WOODS, [SEAL.]
Judge.

62 *Defendant's bill of exceptions No. 2.—Filed March 26th, 1874.*

U. S. circuit court.

MARY P. EVANS *vs.* WM. S. PIKE. } No. 6494.

Be it remembered that on the trial of this case on the 14th day of March, 1873, counsel for plaintiff having introduced evidence tending to show the title relied on by plaintiff, the act of donation from Ackley Perkins to plaintiff; and plaintiff having introduced evidence tending to show the plaintiff had entered into possession under the act of donation of date 5 September, 1861; and plaintiff's counsel having introduced evidence tending to show that Ackley Perkins had acquired the property in question at sheriff's sale the 3d August, 1861; and defendant's counsel having introduced evidence tending to show that at said sheriff's sale of August 3d, 1861, the said Ackley Perkins had executed a twelve-months' bond for the purchase price, with defendant as surety thereon as follows, to wit:

STATE OF LOUISIANA,
Parish of East Baton Rouge:

63 By this public instrument of writing be it known that we, Ackley Perkins as principal, and J. M. Williams and Wm. S. Pike as securities, acknowledge ourselves indebted to Mrs. Eliza C. Johnson, of the parish of West Feliciana and State aforesaid, in the just and full sum of thirty thousand six hundred and ninety-five dollars and eighty cents, ($30,695$\frac{80}{100}$,) with interest at the rate of ten per cent. per annum on the sum of twenty-nine thousand three hundred and forty dollars and twenty cents, ($29,340$\frac{20}{100}$,) from this date until paid; which payment well and truly to be made on the third (3d) day of August, eight-

een hundred and sixty-two, (1862,) we bind ourselves, jointly and severally, our heirs, executors, administrators, and assigns, firmly by these presents; and the better to secure the payment of the above sum of thirty thousand six hundred and ninety-five dollars and eighty cents, ($30,695\frac{80}{100}$,) and interest thereon, we mortgage the following prop-
64 erty, to wit: A certain tract of land or plantation known as the Richland Plantation, and situate in the parish of East Baton Rouge, at about two and one-half miles from the city of Baton Rouge, and containing nineteen hundred and eleven (1,911) acres, more or less, with all the buildings and improvements thereon and thereto belonging; also, the growing crop of cane, corn, &c., &c.; also, the following-named and described slaves, viz: Hannibal, aged 42 years; Pinto, aged 40 years; Harrison, aged 21 years; Cambo, aged 41 years; Randall, aged 32 years; Alpha, aged 24 years; Chloe, aged 50 years; Jenah, aged 55 years; Louisa, aged 14 years; Diani, aged 7 years; Emma, aged 6 years; Belly, aged — years; Sally, aged 28 years; Charity, aged 24 years; Noah, aged 12 years; Long Isaac, aged 28 years; Mary, aged one year; Rodick, aged 50 years; Moses, aged 16 years; Rody, aged 30 years; Alfred, aged 8 years; Short Isaac, aged 36 years; Hannah, aged 20 years, and her infant child; Gustave, aged 51 years; Lucy, aged 30 years; Eliza, aged one year; Lores, aged 21 years; Betsy, aged 26 years; Sam, aged 11 years; Hector, aged 8 years; Abraham, aged 26 years; Christopher, aged 46 years;
65 Little Jim, aged 16 years; Zachariah, aged 22 years; Big Hannah, aged 22 years; Francis, aged 3 years; Jane, aged 3 years; Butler, aged 25 years; George, aged one year; Barbarra, aged 22 years; Henderson, aged 23 years; Annis, aged 23 years; Gerard, aged one year; Joe, aged 3 years; Peter, aged 20 years; Collins, aged 50 years; Maria, aged 35 years; Jim Smart, aged 14 years; Sam, aged 33 years; Giney, aged 28 years; Jefferson, aged 2 years; Dicky, aged one year; Daniel, aged 20 years; Lucy, aged 17 years; Short Frank, aged 54 years; Polly, aged 25 years; Amanda, aged 13 years; Jim Flood, aged 43 years; Priscilla, aged 25 years; Jenny, aged one year; Bill, aged 15 years; Hiram, aged 38 years; Maria, aged 28 years; Sally, aged 12 years; Milly, aged 11 years; Judy, aged 21 years; Roberts, aged 15 years; Roberts, aged 16 years; Becky, aged 16 years; Matilda, aged — years. Also, the entire stock of cattle, hogs, horses, mules, sheep, &c., on the said plantation, as described in the sheriff's deed of sale to the said Ackley Perkins, bearing equal date with this instrument. And the said Ackley Perkins as principal, and J. M. Williams and
66 Wm. S. Pike as securities, do hereby acknowledge this to have the force of a final judgment.

In witness whereof we have hereunto set our hand and seals in the presence of subscribing witnesses this (3rd) third day of August, in the year of our Lord eighteen hundred and sixty-one, (A. D. 1861.)

(Signed) ACLEY PERKINS. [SEAL.]
J. M. WILLIAMS. [SEAL.]
WM. S. PIKE. [SEAL.]

In the presence of—
W. O. BABIN, *Sheriff.*

Written across the face on page 64:

I hereby certify that I have this 10th day of August, 1865, issued an execution on this twelve-months' bond to the parish of East Baton Rouge.

CHARLES B. COLLINS, *Clerk.*

And defendant's counsel having introduced evidence tending to show that at the expiration of said twelve months the same not being paid by the principal thereon, execution was taken out on said 12-months' bond against Ackley Perkins, J. M. Williams, and W. S. Pike, that evidence had been offered by the plaintiff tending to show that the sheriff did not take possession of the property under his seizure, and that neither Ackley Perkins or the plaintiff were notified of the seizure, the property of the surety, William S. Pike, the defendant, and the property in question was seized; and that under said sale the
67 property was adjudicated to said defendant, and the defendant's counsel having introduced the evidence of the sheriff's sale of the land in controversy, to wit:

STATE OF LOUISIANA:

Whereas I, Edward Cousinard, sheriff of the parish of East Baton Rouge, by virtue of a writ of fieri facias, issued on a twelve-months' bond, and to me directed from the honorable seventh judicial district court of the State of Louisiana, in and for the parish of West Feliciana, against the goods and chattels, lands and tenements of Acley Perkins, J. M. Williams, & William S. Pike, at the suit of Eliza C. Johnson vs. J. & H. Perkins, No. 1311 of the records of the hon. 7th judicial district court in and for the parish of West Feliciana, State aforesaid, did seize the property hereinafter described, to wit:

"A certain tract of land or plantation known as the Richland Plantation, and situated in the parish of East Baton Rouge, at or about two and a half miles from the city of Baton Rouge, and containing nineteen hundred and eleven (1,911) acres, more or less, with all the build-
68 ings and improvements thereunto belonging."

Which property was advertised in the Baton Rouge Gazette & Comet, a public newspaper published in this parish, East Baton Rouge, as the law requires, for fully thirty days, to be offered at public sale, in front of the court-house door of said parish of East Baton Rouge, for cash, without the benefit of appraisement, on Saturday, the first day of January, it being the first Saturday of said month, in the year of our Lord one thousand eight hundered & sixty-six, (A. D. 1866,) at 11 o'clock a. m. of said day. And at the time and place above designated, after complying with all the formalities of law, such as reading aloud the public advertizement, terms of sale, and the parish recorder's certificate of mortgages, &c., and having exposed the same to public sale according to law, William S. Pike, esq., of the city of New Orleans, became the purchaser thereof for the sum and price of forty-six thousand seven hundred and twenty-five ($46,725.00) dollars, which I do hereby acknowledge to have received as follows, under the instructions of the
69 plaintiff and with the consent of the purchase, viz: Twenty thousand ($20,000.00) in cash, and in three notes, each for the sum of eight thousand three hundred and eighty ($8,380.00) dollars, bearing ten per cent. interest per annum, the rate of interest of the judgment, from this date, payable at the banking-house of Pike, Lapeyre & Bros., in the city of New Orleans, to the order of the plaintiff, Mrs. Eliza C. Johnson, at one, two, & three years from date, with the agreement made by the parties that said purchaser, Wm. S. Pike, reserves the right to pay said notes at any time before maturity at the elected domicil and with the explicit understanding that, upon the payment and liquidation of said notes, the value of the United States currency is to be estimated at no greater rate of depreciation than as compared with the compara-

tive rate of gold and United States currency on the 1st day of February, A. D. 1866.

The adjudication and sale to be recorded in the office of the parish recorder of the parish of East Baton Rouge, in the book of mort-
70 gages, and the vendor's mortgage to be retained on the property adjudicated until the full and final payment of the above-described notes, to be paraphed by the recorder to identify them with said property adjudicated, as aforesaid, and not to be sold or alienated to the prejudice of the plaintiff, the holder thereof.

The balance of the purchase-money, viz, the sum of fifteen hundred and eighty-two $\frac{20}{100}$ ($1,582$\frac{20}{100}$) dollars, to be paid to Hill and Markham by said Pike, the purchaser.

Now, therefore, know all men by these presents, that I, the said sheriff, do, in consideration of the premises and by virtue of the act in such cases made and provided, grant, bargain, sell, assign, and set over to the said Wm. S. Pike, and to his legal and lawful heirs and assigns, all the above-described "Richland Plantation," and all the right, title, interest, and demand which the said Acley Perkins, J. M. Williams, & Wm. S. Pike, on the 3rd day of August, A. D. 1861, or at any time since, had in or to the said "Richland Plantation," or any part
71 thereof, to hold the same to the said Wm. S. Pike and his legal heirs and assigns forever.

In witness whereof I have hereunto set my hand and seal, in the city of Baton Rouge, this sixth day of January, in the year of our Lord one thousand eight hundred and sixty-six, (A. D. 1866.)

ED. COUSINARD, [SEAL.]
Sheriff.

Sealed & delivered in the presence of—
F. A. YOUNG.
J. A. ALLAIN.

STATE OF LOUISIANA,
Parish of East Baton Rouge:

RECORDER'S OFFICE.

I do certify the foregoing sheriff's deed to be duly recorded in this office, in book U, folio 195, of notarial acts, and of record in book T, folio 105, of conventional mortgages. And I further certify that the United States internal-revenue stamp-duty of forty-seven dollars has been hereunto annexed, paid, and cancelled.

Given under my hand and seal of office at Baton Rouge, this 6th day of January, A. D. 1866.

[SEAL.] JOHN O. CONNOR,
Recorder.

72 [U. S. internal-revenue stamps, amounting to forty-seven dollars, affixed and cancelled.]

Whereupon, after argument of counsel addressed to the jury had closed, the court was requested by the counsel for the plaintiff to charge the jury as follows:

"The creditors who have either a privilege or mortgage on immovables may pursue their claims on them into whatever hand they may happen to pass, to be paid out of their proceeds according to their rank, provided that their titles have been registered according to law.

"The third possession of immovable property mortgaged is bound either to discharge the principal, together with all interest of the debt

which the property was mortgaged, or whatever sum they may amount, or to relinquish the property without any reservation.

"In case the third possessor fails to comply with either of these obligations, every mortgaged and privileged creditor is entitled to
73 cause the immovable, mortgaged or subject to privilege, to be sold, if thirty days after amicable demand of payment from the debtor the debt has not been discharged."

Whereupon the court instructed the jury in the manner and in the terms set forth, saying:

"I instruct you that that is the law; and, further, that the plaintiff in this case stands in the position of a third possessor of the immovable property mortgaged or subject to the privilege, and in order to divest her of title a demand should have been made upon her before this sale could be made."

And thereupon, and then and there, in the presence of the jury and before they had retired, the counsel for the defendant excepted, and tenders this bill of exceptions for signature and seal this 26th day of March, 1874.

(Signed) W. B. WOODS, [SEAL.]
Judge.

74 *Defendant's bill of exceptions, No. 3.—(Filed March 26th, 1874.)*

U. S. circuit court.

MARY P. EVANS *vs.* WM. S. PIKE. } No. 6494.

Be it remembered, that on the trial of the case on the 14th day of March, 1873, counsel for plaintiff having offered in evidence the judgment in the suit of Eliza C. Johnson vs. J. & H. Perkins, of the records of the 7th judicial district court for the parish of East Feliciana, State of Louisiana, but to which suit the plaintiff was not a party, and the sheriff's sale of 3d August, 1861, to Ackley Perkins, and the act of donation of the 5th of September, 1861, by Ackley Perkins to plaintiff.

And the counsel for defendant having offered in evidence the twelve months' bond, executed by said Ackley Perkins with defendant as a surety thereon on said 3d day of August, 1861; and the execution issued thereon on the 10th day of August, 1865; and the sheriff's sale of
75 January 6, 1866, to said defendant; and the acknowledgment therein made of the payment by said defendant of the sum of ($46,725.00) forty-six thousand seven hundred and twenty-five dollars.

And counsel for defendant having offered in evidence testimony tending to show that defendant purchased the property in dispute at sheriff's sales on the 6th January, 1866; and that from that date to the institution of the present suit he had been in undisturbed possession of the said property.

And counsel for defendant having offered in evidence a letter dated New Orleans, May 9th, 1871, addressed to Mrs. Mary P. Evans, No. 308 Terspichore street, New Orleans, the plaintiff:

"DEAR MADAM: On a recent visit to Baton Rouge, I had occasion to call at the office of the parish recorder, and my attention was
76 invited by him to what purports to be an act of sale from Henry Perkins to yourself, passed before Octave Morel, notary public in and for the city of New Orleans, on the 11th day of March, 1871, where-

n he pretends to convey to you the plantation situated in the parish of East Baton Rouge, known as Richland Plantation, being the same property purchased by me at sheriff's sale in 1865 or 1866, under judgment and execution against J. & H. Perkins, in favor of the heirs of Johnson, holders of the first mortgage and vendor's privilege upon the property, and I, unfortunately, the security of said J. & H. Perkins, was compelled to become the purchaser in self-defense, inasmuch as the writ of seizure not only covered the Richland Plantation, but also all of the property owned by me in Baton Rouge. Having paid in cash the full amount of the purchase-price, I believe my title cannot be questioned.

"This most extraordinary proceeding on the part of Henry Perkins I am unable to understand.

77 "May I beg of you an answer to this, and may I ask your explanation to this very strange movement before I take such legal steps in the matter as to me may seem necessary and proper?

"I am, madam, very respectfully, yours,

(Signed) "WM. S. PIKE."

And counsel for defendant having introduced in evidence a letter from plaintiff to defendant:

"To WM. S. PIKE, *New Orleans:*

"DEAR SIR: Owing to the absence of a member of my family from this city, I am unable to comprehend or answer yours of May the 9th before his return, which will probably be on Saturday next. I will inform myself fully upon this strange subject, and will then answer you with all I know, most certainly.

"Believe me, most truly, etc.,

(Signed) "MARIE P. EVANS.

"NEW ORLEANS, *May* 11, 1871."

78 And counsel for defendant thereupon, in presence of the jury, *the counsel for defendant* requested the court to charge:

"If the jury finds that Pike was a bona-fide purchaser of the property in dispute, and that he paid the mortgage which was an incumbrance upon the property at the time of sale, then, should you find a verdict for the plaintiff, you shall also find that the plaintiff shall refund to Pike the amount so paid by him, with interest, before taking possession of said property."

Whereupon the court refused so to charge, and the counsel for defendant then and there, before the jury had retired, excepted to the refusal of the court so to charge, and tenders this bill of exceptions for signature and seal, this 26th day of March, A. D. 1874.

(Signed) W. B. WOODS, *Judge.*

Defendant's bill of exception, No. 4.—*Filed March* 26, 1874.

79 U. S. circuit court.

MARY P. EVANS *vs.* WM. S. PIKE. } No. 6494.

Be it remembered that on the trial of this case on the 14 day of March, 1873, the counsel for the plaintiff having introduced in evidence

the act of donation by Ac'ley Perkins to plaintiff of September 5th, 1861, hereto annexed, and prayed to be read as part hereof, to wit:

STATE OF LOUISIANA,
Parish of East Baton Rouge:

Be it known that on the day of the date hereof, and in presence of the witnesses hereinafter named and undersigned, before me, William Hubbs, recorder in and for the parish of East Baton Rouge, State of Louisiana, duly commissioned and sworn, personally came and appeared Ackley Perkins, of this parish, who declared that in consideration of the love and affection which he bears towards his niece, Mrs. Mary Perkins, wife
80 of Stephen Duncan Linton, also of this parish, and for divers and other good and sufficient causes, he has give' and donated and doth by these presents grant, give, convey, assign, and set over, in the best form of donation inter vivos, and irrevocably and forever, unto his niece, Mrs. Mary Linton, wife as aforesaid, here present and accepting and receiving for herself, her heirs and assigns, and being herein duly aided, authorized, and assisted by her said husban', Stephen Duncan Linton, the following-described property, to wit: 1st. A certain tract of land or plantation, now in the cultivation of sugar, situated about two miles from the city of Baton Rouge, containing seventeen hundred and thirty arpents, (1,730,) more or less, with all the buildings and improvements thereon, consisting of a dwelling-house, sugar-house, mills, machinery of every description, and all the out-houses pertaining to the same. It being the same property acquired by J. & H. Perkins from Eugene Howell, on the 19th day of December, 1865. 2nd. One hundred acres of land purchased of a colored woman named Phœbe Anerstone.
81 3rd. A tract of land purchased of Mr. Williams, containing five hundred acres, making in all twenty-five hundred arpents, more or less.

Also the following named and described slaves for life, to wit, Charity, aged about 60 years; Mary, 25 years; Harry, 10 years; an infant, 6 months; Tom, 30 years; Jane, 32 years, and her two children; Jack Cyrus, 42 years; Big Fanny, 38 years; Little Jack, 14 years; Bibi, 12 years; Alexander, 10 years; Caroline, 35 years; Malinda, 15 years; Johnston, 13 years; Sylvester, 10 years; Lucy Young, 40 years; Sap, 40 years; Dorah, 14 years; John, 25 years; Sue, 20 years; Henry, 4 years; Ned, 35 years; Clarissa, 30 years; Libby, 13 years; Big Milly, 45 years; Lilla, 20 years; Annanias, 12 years; Milissa, 10 years; Burrel, 35 years; Dirah, 30 years; Affa, 10 years; Richard, 8 years; Lavina, 6 years; Carry, 4 years; Gus, 7 years; Lucy, 60 years; Pat, 11 years; Little Randall, 60 years; Lewis, 55 years; Betsey, 55 years; Sam Lewis, 60 years; Polly, 50 years; Sharlott, 15 years; Hector, 35 years; Jefferson, 12 years; Nelly, 25 years; Josephine, 21 years; Margaret, 2 years; Henry, 18 years; Henderson, 55 years; Patience, 50
82 years; Ludy, 8 years; Jacob, 28 years; Minerva, 20 years; Stephen Cash, 50 years; Cory, 45 years; Monroe, 20 years; Moralie, 18 years; Stephens, 17 years; Margaret, 16 years; Caroline, 13 years; Sarah, 8 years; Bill, 2 years; Sam Patterson, 30 years; Duncan, 30 years; Lucywin, 40 years; Laura, 18 years; Bidger, 15 years; Aby, 12 years; Rosa Ann, 5 years; Chas. Everige, 50 years; Giney, 50 years; Little Chas. 18 years; Jerry, 45 years; Emma, 35 years; Aggiah, 11 years; Felix, 9 years; Emma, 2 years; an infant; Edward, 15 years; Allen, 45 years; Nat, 22 years; Randall, 20 years; Tillia Ann, 16 years; Dennis, 24 years; Julia, 24 years; Daniel, 6 years; an infant; Matt, 40 years; Jim, 50 years; Mary Ann, 40 years; John Willis, 15

years; Louisa, 16 years; Robert, 14 years; Julia, 14 years; Little William, 22 years; Mary Fules, 24 years; Charity, 14 years; an infant; Jerry Bell, 45 years; Angelina, 15 years; Alexander, 12 years; Harrison, 50 years; Martha Ann, 25 years; Adeline, 12 years; Atuserid, 11 years; Sarah, 40 years; Willis, 15 years; Lally, 6 years; Huestin, 2 years; Martha Young, 25 years; Berky, 40 years; 22
83 years; Long Bell, 40 years; Anthony, 40 years; Jane Graham, 35 years, and her child, little Fanny, 18 years; Cloe, 24 years; Dempsey, 9 years; Bully, 8 years; Lilly, 24 years, and child, Beckey; Baujau Sarah, 30 years; Little Milley, 40 years; Little Marion, 60 years; Auny, 40 years; Sandy, 35 years; Valery, 20 years; Nancy, 35 years; Lewis, 45 years; Judis, 55 years; Lizzie, 12 years; Fred, 15 years; Joe, 15 years; Phebe, 18 years; and Sam, 35 years.

Also 48 mules, 30 head of cattle, 100 head of hogs, 15 waggons & carts, farming utensils, household & kitchen furniture, 3,000 bbls. corn, hay and fodder in store, and 52 head sheep.

Being the same property purchased by the present donor at sheriff's sale on the 5th day of January last, 1861, at the suit of Fellowes & Co. vs. J. & H. Perkins, No. 1610 of the records of sixth judicial district court, and recorded in book R, fol. 295, notarial acts of this office.

To have and to hold the above-described property unto the said Mrs. Mary Linton, her heirs and assigns forever.

The foregoing act was then read to the parties, and by them
84 approved. And the parties dispense with the production of a certificate from the recorder of this parish, as required by article 3328 of the civil code of this State.

This done and passed in my office at Baton Rouge, in the presence of Lewis Adams and H. V. Babin, witnesses, who sign their names with the parties and me, recorder, this fifth day of September, in the year of our Lord one thousand eight hundred and sixty-one (1861.)

(Signed) AC'LEY PERKINS.
" MARY LINTON.
" S. DUNCAN LINTON.

(Signed) H. V. BABIN.
" LEWIS ADAMS.

(Signed) WM. HUBBS,
Recorder.

On the back:

STATE OF LOUISIANA,
Parish of East Baton Rouge:

I do hereby certify the within to be a true copy from the original in book T, fol. 76, of notarial acts of this office and recorded in donation book 7th Sept., 1861.

Given under my hand and seal of office at Baton Rouge this 23rd day of August, A. D. 1871.

[SEAL.] (Signed) W. B. COOPER,
Dy. Recorder.

[5 ct. stamp, int. rev.]

85 The counsel for the defendant moved the court to charge the jury—

"If the jury find that the title relied on by plaintiff is that of a donation from Ac'ley Perkins, then it is a gratuitous contract, and the jury is instructed that where a contract is purely gratuitous, it shall be presumed to have been made in fraud of creditors, if at the time of

the act of donation by Ac'ley Perkins to plaintiff of September 5th, 1861, hereto annexed, and prayed to be read as part hereof, to wit:

STATE OF LOUISIANA,
Parish of East Baton Rouge:

Be it known that on the day of the date hereof, and in presence of the witnesses hereinafter named and undersigned, before me, William Hubbs, recorder in and for the parish of East Baton Rouge, State of Louisiana, duly commissioned and sworn, personally came and appeared Ackley Perkins, of this parish, who declared that in consideration of the love and affection which he bears towards his niece, Mrs. Mary Perkins, wife
80 of Stephen Duncan Linton, also of this parish, and for divers and other good and sufficient causes, he has give' and donated and doth by these presents grant, give, convey, assign, and set over, in the best form of donation inter vivos, and irrevocably and forever, unto his niece, Mrs. Mary Linton, wife as aforesaid, here present and accepting and receiving for herself, her heirs and assigns, and being herein duly aided, authorized, and assisted by her said husban', Stephen Duncan Linton, the following-described property, to wit: 1st. A certain tract of land or plantation, now in the cultivation of sugar, situated about two miles from the city of Baton Rouge, containing seventeen hundred and thirty arpents, (1,730,) more or less, with all the buildings and improvements thereon, consisting of a dwelling-house, sugar-house, mills, machinery of every description, and all the out-houses pertaining to the same. It being the same property acquired by J. & H. Perkins from Eugene Howell, on the 19th day of December, 1865. 2nd. One hundred acres of land purchased of a colored woman named Phœbe Anerstone.
81 3rd. A tract of land purchased of Mr. Williams, containing five hundred acres, making in all twenty-five hundred arpents, more or less.

Also the following named and described slaves for life, to wit, Charity, aged about 60 years; Mary, 25 years; Harry, 10 years; an infant, 6 months; Tom, 30 years; Jane, 32 years, and her two children; Jack Cyrus, 42 years; Big Fanny, 38 years; Little Jack, 14 years; Bibi, 12 years; Alexander, 10 years; Caroline, 35 years; Malinda, 15 years; Johnston, 13 years; Sylvester, 10 years; Lucy Young, 40 years; Sap, 40 years; Dorah, 14 years; John, 25 years; Sue, 20 years; Henry, 4 years; Ned, 35 years; Clarissa, 30 years; Libby, 13 years; Big Milly, 45 years; Lilla, 20 years; Annanias, 12 years; Milissa, 10 years; Burrel, 35 years; Dirah, 30 years; Affa, 10 years; Richard, 8 years; Lavina, 6 years; Carry, 4 years; Gus, 7 years; Lucy, 60 years; Pat, 11 years; Little Randall, 60 years; Lewis, 55 years; Betsey, 55 years; Sam Lewis, 60 years; Polly, 50 years; Sharlott, 15 years; Hector, 35 years; Jefferson, 12 years; Nelly, 25 years; Josephine, 21 years; Margaret, 2 years; Henry, 18 years; Henderson, 55 years; Patience, 50
82 years; Ludy, 8 years; Jacob, 28 years; Minerva, 20 years; Stephen Cash, 50 years; Cory, 45 years; Monroe, 20 years; Moralie, 18 years; Stephens, 17 years; Margaret, 16 years; Caroline, 13 years; Sarah, 8 years; Bill, 2 years; Sam Patterson, 30 years; Duncan, 30 years; Lucywin, 40 years; Laura, 18 years; Bidger, 15 years; Aby, 12 years; Rosa Ann, 5 years; Chas. Everige, 50 years; Giney, 50 years; Little Chas. 18 years; Jerry, 45 years; Emma, 35 years; Aggiah, 11 years; Felix, 9 years; Emma, 2 years; an infant; Edward, 15 years; Allen, 45 years; Nat, 22 years; Randall, 20 years; Tillia Ann, 16 years; Dennis, 24 years; Julia, 24 years; Daniel, 6 years; an infant; Matt, 40 years; Jim, 50 years; Mary Ann, 40 years; John Willis, 15

years; Louisa, 16 years; Robert, 14 years; Julia, 14 years; Little William, 22 years; Mary Fules, 24 years; Charity, 14 years; an infant; Jerry Bell, 45 years; Angelina, 15 years; Alexander, 12 years; Harrison, 50 years; Martha Ann, 25 years; Adeline, 12 years; Atuserid, 11 years; Sarah, 40 years; Willis, 15 years; Lally, 6 years; Huestin, 2 years; Martha Young, 25 years; Berky, 40 years; 22
83 years; Long Bell, 40 years; Anthony, 40 years; Jane Graham, 35 years, and her child, little Fanny, 18 years; Cloe, 24 years; Dempsey, 9 years; Bully, 8 years; Lilly, 24 years, and child, Beckey; Baujau Sarah, 30 years; Little Milley, 40 years; Little Marion, 60 years; Auny, 40 years; Sandy, 35 years; Valery, 20 years; Nancy, 35 years; Lewis, 45 years; Judis, 55 years; Lizzie, 12 years; Fred, 15 years; Joe, 15 years; Phebe, 18 years; and Sam, 35 years.

Also 48 mules, 30 head of cattle, 100 head of hogs, 15 waggons & carts, farming utensils, household & kitchen furniture, 3,000 bbls. corn, hay and fodder in store, and 52 head sheep.

Being the same property purchased by the present donor at sheriff's sale on the 5th day of January last, 1861, at the suit of Fellowes & Co. vs. J. & H. Perkins, No. 1610 of the records of sixth judicial district court, and recorded in book R, fol. 295, notarial acts of this office.

To have and to hold the above-described property unto the said Mrs. Mary Linton, her heirs and assigns forever.

The foregoing act was then read to the parties, and by them
84 approved. And the parties dispense with the production of a certificate from the recorder of this parish, as required by article 3328 of the civil code of this State.

This done and passed in my office at Baton Rouge, in the presence of Lewis Adams and H. V. Babin, witnesses, who sign their names with the parties and me, recorder, this fifth day of September, in the year of our Lord one thousand eight hundred and sixty-one (1861.)

(Signed) AC'LEY PERKINS.
" MARY LINTON.
" S. DUNCAN LINTON.

(Signed) H. V. BABIN.
" LEWIS ADAMS.

(Signed) WM. HUBBS,
Recorder.

On the back:

STATE OF LOUISIANA,
Parish of East Baton Rouge:

I do hereby certify the within to be a true copy from the original in book T, fol. 76, of notarial acts of this office and recorded in donation book 7th Sept., 1861.

Given under my hand and seal of office at Baton Rouge this 23rd day of August, A. D. 1871.

[SEAL.] (Signed) W. B. COOPER,
Dy. Recorder.

[5 ct. stamp, int. rev.]

85 The counsel for the defendant moved the court to charge the jury—

"If the jury find that the title relied on by plaintiff is that of a donation from Ac'ley Perkins, then it is a gratuitous contract, and the jury is instructed that where a contract is purely gratuitous, it shall be presumed to have been made in fraud of creditors, if at the time of

making it the debtor had not, over and above the amount of his debts, more than twice the amount of the property passed by such gratuitous contract." (C. C. 1980.) To which the court added:

"But if the jury is satisfied that this conveyance did not have the effect of defrauding Pike in any way, if his claims was still a lien upon the land, notwithstanding the conveyance, I instruct you that he was not defrauded by it."

Whereupon counsel for the defendant excepted to this modification, then and there, before the jury had retired, and tenders this bill of exceptions for signature & seal, this 26th day of March, 1874.

(Signed) W. B. WOODS, *Judge.*

86 *Defendant's bill of exceptions, No. 5.—Filed March* 26, 1874.

U. S. circuit court.

MARY P. EVANS *vs.* WM. S. PIKE. } No. 6494.

Be it remembered that on the trial of this case in open court on the 14th day of March, 1873, plaintiff having introduced in evidence a copy of the act of donation by Ac'ley Perkins to Mrs. Mary Linton, the plaintiff, executed before William Hubbs, recorder of the parish of East Baton Rouge, conveying to her the following property, viz:

1st. A certain tract of land or plantation now in the cultivation of sugar, situated about two miles from the city of Baton Rouge, containing seventeen hundred and thirty (1,730) arpents, more or less, with all the improvements thereon, consisting of a dwelling-house, sugar-house, mills, machinery of every description, and all the out-houses pertaining to the same, it being the same property acquired by J. & H. Perkins from Eugene Howell on the 19th day of December, 1865.

87 2nd. One hundred acres of land purchased of a colored woman named Phebe Aneeston.

3d. A tract of land purchased of Mr. Williams, containing five hundred acres, making in all twenty-five hundred arpents, more or less.

Also, the following named and described slaves for life, to wit: Charity, aged about 60 years; Mary, 25 years; Harry, 10 years; an infant, 6 mos.; Tom, 30 years; Jane, 32 years, and her two children; Jack Cyrus, 42 years; Big Faney, 38 years; Little Jack, 14 years; Bibi, 12 years; Alexander, 10 years; Caroline, 35 years; Malinda, 15 years; Johnston, 13 years; Sylvester, 10 years; Lucy Young, 40 years; Sap, 40 years; Dorah, 14 years; John, 25 years; Sue, 20 years; Henry, 4 years; Ned, 35 years; Clarissa, 30 years; Libby, 13 years; Big Milly, 45 years; Lilla, 20 years; Annanias, 12 years; Milissa, 10 years; Burrel, 35 years; Dirah, 30 years; Affa, 10 years; Richard, 8 years; Lavina, 6 years; Carry, 4 years; Gus, 70 years; Lucy, 60 years; Pat, 11 years; Little Randall, 60 years; Lewis, 55 years; Betsey, 55 years; Sam Lewis, 60 years; Polly, 50 years; Sharlott, 15 years; Hector, 35

88 years; Jefferson, 12 years; Nelly, 25 years; Josephine, 21 years; Margaret, 2 years; Henry, 18 years; Henderson, 55 years; Patience, 50 years; Ludy, 8 years; Jacob, 28 years; Minerva, 20 years; Stephen Cash, 50 years; Cora, 45 years; Monroe, 20 years; Moralie, 18 years; Stephen, 17 years; Margaret, 16 years; Stephen, 17 years; Caroline, 13 years; Sarah, 8 years; Bell, 2 years; Sam Patterson, 30 years; Duncan, 30 years; Lucy Win, 40 years; Laura, 18 years; Bidger, 15 years; Aby, 12 years; Rosa Ann, 5 years; Chas Everige, 50 years;

Geney, 50 years; Little Charles, 18 years; Jenny, 45 years; Emma, 35 years; Aggiah, 11 years; Felix, 9 years; Emma, 25 years; an infant; Edward, 15 years; Allen, 45 years; Nat, 22 years; Randall, 20 years; Tillia Ann, 16 years; Dennis, 24 years; Julia, 24 years; Daniel, 6 years; an infant; Matt, 40 years; Jim, 50 years; Mary Ann, 40 years; John Willis, 15 years; Louisa, 16 years; Robert, 14 years; Julia, 14 years; Little William, 22 years; Mary Fulis, 24 years; Charity, 14 years; an infant; Jerry Bell, 45 years; Angelina, 15 years; Alexander, 12 years; Harrison, 50 years; Martha Ann, 25 years; Adeline, 12 years;
89 Atusend, 11 years; Sarah, 40 years; Willis, 15 years; Sally, 6 years; Huestia, 2 years; Martha Young, 25 years; Beckey, 40 years; , 22 years; Long Bell, 40 years; Anthony, 40 years; Jane Graham, 35 years, and her children; little Fanny, 18 years; Chloe, 24 years; Dempsey, 9 years; Bully, 8 years; Lilly, 24 years, and child; Beckey, (Baujau Sarah,) 30 years; Little Milley, 40 years; Little Marion, 60 years; Anny, 40 years; Sandy, 35 years; Valery, 20 years; Nancy, 35 years; Lewis, 45 years; Judis, 55 years; Lizzie, 12 years; Fred, 15 years; Joe, 15 years; Phebe, 18 years, and Sam, 35 years.

Also 48 mules, 30 head of cattle, 100 head of hogs, 15 waggons & carts, farming utensils, household & kitchen furniture, 3,000 bbls. corn, hay and fodder in store, and 52 head of sheep; and further proof tending to show that she took possession of such property under said donation, and held the same until dispossessed Janu'y 6, 1866.

Defendant offered to introduce evidence by the testimony of William S. Pike, H. V. Babin, J. W. McMann, J. Hunter Collins, William W. Leake, John T. Irvine, & Charles B. Collins, tending to show
90 that Ackley Perkins owned no other property than said property so donated, said evidence being offered by defendant in support of the defense set up in his answer "that donations inter vivos shall in no case divest the donor of all his property; he must reserve for himself enough for subsistence; if he does not do it the donation is null for the whole."

And thereupon the court refused to receive said testimony, and refused defendant the right to offer the same, and thereupon and then and there, in the presence of the jury, and before they had retired, the counsel for the defendant excepted, and tenders this bill of exception for signature & seal this March 26th, 1874.

(Signed) W. B. WOODS, *Judge.* [SEAL.]

Defendants' bill of exception, No. 6.—Filed March 26, 1874.

U. S. circuit court.

MARY P. EVANS *vs.* WM. S. PIKE. } 6494.

Be it remembered that on the trial of this case, on the 14th
91 day of March, 1873, counsel for plaintiff having introduced in evidence the act of donation from Ackley Perkins to plaintiff of Sept. 6, 1861—

The counsel for defendant moved the court to charge, "That in a gratuitous contract, the presumption of the law being that it is fraudulent as respects creditors, unless the donor had at the time of making the donation, over and above his debts, twice the amount of the property donated, the burden is thrown upon the donee to establish the circumstances which will repel the presumption of a fraudulent intent. And if the jury find that the plaintiff has not proved that Ackley Per-

kins was worth, over and above all his debts, twice the amount of the property donated by him to plaintiff, then the presumption of the law must prevail, and the jury find for the defendant;" which charge the court refused to give, adding, "I will say, that if you are satis-
92 fied that this property was conveyed by Ackley Perkins to Mrs. Evans in such a manner as to defeat the rights of Pike, as his creditor, then the conveyance is void, and Pike can set up that fact, but not otherwise." To which charge the counsel for defendent excepted, then and there, before the jury had retired, and tenders this bill of exceptions for signature and seal, on this 26th day of March, 1874.

(Signed) W. B. WOODS, *Judge.* [SEAL.]

Defendant's bill of exception, No. 7.—Filed March 26th, 1874.

U. S. circuit court.

MARY P. EVANS *vs.* WM. S. PIKE. } No. 6494.

Be it remembered that on the trial of this case, on the 14th day of March, 1873, counsel for plaintiff having offered in evidence the act of donation from Ackley Perkins to plaintiff, of date September 5th, 1861, and counsel for defendant having offered in evidence the twelve months' bond executed by Ackley Perkins with Wm. S. Pike, defendant,
93 as surety thereon, of date Aug. 3, 1861; and counsel for defendant having offered in evidence the act of sheriff's sale of date January 6, 1866, to show the payment by said Pike, the defendant, of the full amount of said bond with interest—

The counsel for defendant moved the court to charge:

"If the jury find that Wm. S. Pike was a surety on a bond of Ackley Perkins, given by said Perkins for the plantation now in contest in this suit, prior to the act of donation to plaintiff, and that, subsequently, Pike paid the full amount of said bond with interest, then the jury is instructed that Pike was a creditor of Ackley Perkins at the time the said donation was made to plaintiff." 23 A., 402; 31 Maryland; City of Baltimore vs. Gill, 5 Barb., 410; 18 Weed, 375; 5 Concer., 4 Grey, 195.

Whereupon the court said, "I give you this instruction, reminding you, however, that in order to make the fact that Pike was a creditor to have any effect in this case, the defendant must also show that this conveyance by Ackley Perkins to Mrs. Evans, the plaintiff in
94 this case, had the effect of defrauding him, he being a creditor; and thereupon the counsel for defendant excepted to this modification, then and there before the jury had retired, and tend*ing* this bill of exceptions for signature and seal this 26th day of March, 1874.

(Signed) W. B. WOODS, *Judge.* [SEAL.]

Defendant's bill of exception, No. 8.—Filed March 26, 1874.

U. S. circuit court.

MARY P. EVANS *vs.* WM. S. PIKE. } No. 6494.

Be it remembered that on the trial of this case, on the 14th day of March, 1873, defendant's counsel, having introduced evidence tending to show that Pike, the defendant, had been in possession of the prop-

erty claimed by plaintiff for a period of five years, and that he purchased the same at sheriff's sale as by the annexed deed, copy annexed and prayed to be read as part hereof, to wit:

95 STATE OF LOUISIANA:

Whereas I, Edward Cousinard, sheriff of the parish of East Baton Rouge, by virtue of a writ of fieri facias, issued on a twelve-months' bond, and to me directed, from the honorable seventh judicial district court of the State of Louisiana, in and for the parish of West Feliciana, against the goods and chattels, lands and tenements of Ac'ley Perkins, J. M. Williams, and William S. Pike, at the suit of Eliza C. Johnson vs. J. & H. Perkins, No. 1311 of the records of the hon. seventh judicial district court in and for the parish of West Feliciana, State aforesaid, did seize the property hereinafter set forth and described, to wit:

A certain tract of land, or plantation, known as the "Richland plantation," and situated in the parish of East Baton Rouge, at about two and a half miles from the city of Baton Rouge, and containing nineteen hundred and eleven (1911) acres, more or less, with all the buildings and improvements thereunto belonging.

Which property was advertised in the Baton Rouge "Gazette
96 & Comet," a public newspaper published in this parish of Baton Rouge, as the law requires, for fully thirty days, to be offered at public sale in front of the court-house door of said parish of East Baton Rouge, for cash, without the benefit of appraisement, on Saturday, the sixth day of January, it being the first Saturday of said month, in the year of our Lord one thousand eight hundred & sixty-six, (A. D. 1866,) at 11 o'clock a. m. of said day; and at the time and place above designated, after complying with all the formalities of law, such as reading aloud the public advertisement, terms of sale, and the parish recorder's certificate of mortgages, &c., and having exposed the same to public sale according to law, William S. Pike, esq., of the city of New Orleans, become the purchaser thereof for the sum and price of forty-six thousand seven hundred and twenty-five ($46,725.00) dollars, which I do hereby acknowledge to have received as follows, under the instructions of the plaintiff, and with the consent of the purchaser, viz: Twenty
97 thousand three hundred and eighty $\frac{50}{100}$ ($20,380.50) in cash, and in three notes, each for the sum of eight thousand three hundred and eighty $\frac{50}{100}$ ($8,380.50) dollars, bearing ten per cent. interest per annum, the rate of interest of the judgment, from this date, payable at the banking-house of Pike Lapeyre and Brothers, in the city of New Orleans to the order of the plaintiff, Mrs. Eliza C. Johnson, at one, two and three years from date; with the agreement, made by the parties, that said purchaser, Wm. S. Pike, reserves the right to pay said notes at any time before maturity at the elected domicil, and with the explicit understanding that upon the payment or liquidation of said notes the value of the United States currency is to be estimated at no greater rate of depreciation than as compared with the comparative rate of gold and United States currency on the 1st day of February, A. D. 1866.

The adjudication and sale to be recorded in the office of the parish recorder of the parish of East Baton Rouge, in the book of mortgages, and the vendor's mortgages to be retained on the property adjudicated until the full and final payment of the above-described notes, to
98 be paraphed by the recorder, to identify them with said property adjudicated as aforesaid, and not to be sold or alienated to the prejudice of the plaintiff, the holder thereof.

The balance of the purchase-money, viz, the sum of fifteen hundred and eighty-two $\frac{20}{100}$ ($1,582.20) dollars, to be paid to Hill & Markham by said Pike, the purchaser.

Now, therefore, know all men by these presents that I, the said sheriff, do, in consideration of the premises and by virtue of the act in such cases made and provided, grant, bargain, sell, assign, and set over to the said Wm. S. Pike, and to his legal and lawful heirs and assigns, all the above-described "Richland plantation," and all the right, title, interest, and demand which the said Ackley Perkins, J. M. Williams, and Wm. S. Pike, on the 3rd day of August, A. D. 1861, or at any time since, had in or to the said "Richland plantation," or any part thereof; to hold the same to the said Wm. S. Pike and his legal heirs and assigns forever.

99 In witness whereof I have hereunto set my hand and seal in the city of Baton Rouge, this sixth day of January, in the year of our Lord one thousand eight hundred and sixty-six, (A. D. 1866.)

ED. COUSINARD, *Sheriff.* [SEAL.]

Sealed & delivered in the presence of—

(Signed) F. M. YOUNG.
" J. A. ALLAIN.

STATE OF LOUISIANA,
Parish of East Baton Rouge:

RECORDER'S OFFICE.

I do certify the foregoing sheriff's deed to be duly recorded in this office in book U, folio 195, of notarial acts, and of record in book T, folio 105, of conventional mortgages. And I further certify that the United States internal-revenue stamp duty of forty-seven dollars has been hereunto annexed, paid, and cancelled.

Given under my hand and seal of office at Baton Rouge this 6th day of January, A. D. 1866.

[SEAL.] (Signed) JOHN O'CONNOR, *Recorder.*

[U. S. internal-revenue stamps for forty-seven dollars affixed and cancelled.]

100 The counsel for the defendant moved the court to charge—

"If the jury find that Pike has been in possession of the property claimed by plaintiffs for a period of five years, and that he purchased the same from any person authorized to sell at public auction, then any informality connected with or growing out of said sale is cured by the lapse of said five years."

The court gave the instructions, but added—

"That if the sheriff did not seize the property, that that is an informality that is not cured by possession for five years."

Whereupon, then and there, the counsel for defendant excepted to this modification of the charge asked before the jury had retired, and tenders this bill of exceptions for signature and seal this 26th day of March, A. D. 1874.

(Signed) W. B. WOODS, *Judge.* [SEAL.]

101 *Defendant's bill of exception, No. 9.—Filed March 26th, 1874.*

U. S. circuit court.

MARY P. EVANS
vs.
WM. S. PIKE. } No. 6494.

Be it remembered that on the trial of this case, on the 14 day of March, 1873, counsel for defendant having offered in evidence the

sheriff's return on the execution passed on the twelve-months' bond hereto annexed, and prayed to be taken as a part hereof, tending to show that the sheriff seized the property in question and advertised it for sale a period of thirty days, and the plaintiff having offered evidence tending to show that the sheriff did not take possession of said property at the time of his alleged seizure, & that Ackley Perkins, defendant in execution, resided out of the parish and was not notified of the seizure, and further that the plaintiff was in possession of the property at the time of seizure through her agent; counsel for plaintiff moved
102 the court to charge the jury that the defendant must prove that the sheriff took the property into his possession, which charge the court gave the jury in said terms; whereupon, then and there, before the jury had retired, the counsel for defendant excepted to the charge of the court, and tenders this bill of exceptions for signature and seal, which signed and sealed accordingly.

(Signed) W. B. WOODS, *Judge.* [SEAL.]

STATE OF LOUISIANA:

Whereas I, Edward Cousinard, sheriff of the parish of East Baton Rouge, by virtue of a writ of fieri facias on a twelve-months' bond, and to me directed from the hon. seventh judicial court of the State of Louisiana, in and for the parish of West Feliciana, against the goods and chattels, lands and tenements, of Ac'ley Perkins, J. M. Williams, and Wm. S. Pike, at the suit of Eliza C. Johnson vs. J. & H. Perkins, No. 1311 of the records of the hon. judicial district court in and for the parish of West Feliciana, State of Louisiana, did seize the follow-
103 ing-described property, to wit: A certain tract of land—a plantation—known as the "Richland plantation," & situated in the parish of East Baton Rouge, at about two and one half miles from the city of Baton Rouge, and containing nineteen hundred and eleven (1,911) acres, more or less, with all the buildings and improvements thereto belonging; also, the following-described property belonging to Wm. S. Pike, to wit:

1st. A certain lot of ground, situated in that part of the city of Baton Rouge laid out by the late Leonard, and designated on the plat thereof as lot No. eleven, (11,) of square No. three, (3,) measuring sixty (60) feet front on Church street, by one hundred & twenty (120) feet in depth on Convention street, being a corner lot.

2nd. Lots No. six (6) and twelve, (12,) of square No. three, (3,) situated in the city of Baton Rouge, and in that part of said city laid out by Hickey, Duncan & Mather.

3rd. A certain lot of ground, situated in that part of the city of
104 Baton Rouge laid out by the late Richard Derall, and designated on the plan thereof as lot No. seven, (7,) of square No. (3,) measuring sixty feet (60) front on Third street, by one hundred and twenty feet in depth on Florida street, it being a corner lot.

4th. A certain lot of ground, situated in that part of the city of Baton Rouge, laid out by the late Gilbert Leonard, and designated on the plan thereof as lot No. ten, (10,) of square No. three, (3,) measuring sixty (60) feet front on Church (formerly Main) street, by one hundred and twenty (120) feet in depth, French measure.

5th. Two certain lots of ground, situated in that part of the city of Baton Rouge laid out by Richard Derall, and designated on the plan thereof as lots Nos. five (5) and six, (6,) of square No. three, (3,) measuring each sixty (60) feet front, by one hundred & twenty (120) feet in depth, French measure.

6th. A certain lot of ground, situated in that part of the city of Baton Rouge laid out by Hicky, Duncan & Mather, and designated on
105 the plan thereof as lot No. four, (4,) in square No. five, (5,) measuring sixty feet front on Florida street, by one hundred and twenty (120) feet in depth, French measure.

7th. A certain lot of ground situated in that part of the city of Baton Rouge laid out by Hicky, Duncan & Mather, and designated on the plan thereof as lot No. (3,) three, in square No. five, (5,) measuring sixty (60) feet front on Florida street by one hundred & twenty (120) feet between parallel lines.

8th. Three certain lots of ground, situated in the same part of the city of Baton Rouge as the last above described, being lots Nos. nine, (9,) ten, (10,) and eleven, (11,) in square No. five, (5.)

9th. Four certain lots of ground, situated in that part of the city of Baton Rouge laid out by Hicky, Duncan & Mather, and designated on the plan thereof, as made by W. & W. G. Waller, as lots Nos. six, (6,) seven, (7,) eight, (8,) and twelve, (12,) of square No. five, (5;) lot six (6) having a front of sixty (60) feet on W. Hypolite street, by
106 a depth of one hundred and fifty (150) feet; No. seven (7) forming the southwest corner of W. Hypolite and Convention streets, by a depth of one hundred and twenty feet on W. Hypolite streets; lot No. eight (8) having a front of sixty (60) feet on Convention street by a depth of one hundred and twenty feet; lot No. twelve (12) having a front of sixty (60) feet on Fifth street by a depth of one hundred and fifty feet, French measure, with all the improvements on the above described lots, respectively, and all the rights and privileges in any manner appertaining thereto; which property was advertised in the Baton Rouge Gazette and Comet, a public newspaper, published in this parish, East Baton Rouge, for fully thirty days next preceeding the day of sale, as the law requires, to be offered at public sale, in front of the court-house door of said parish of East Baton Rouge, on Saturday the sixth day of January, it being the first Saturday of said month, in the year of our Lord one thousand eight hundred and sixty-six, (A. D. 1866,) at 11 o'clock a. m. of said day, for cash, without the benefit of appraisement; and,
107 at the time and place above designated, after complying with all the formalities of law, such as reading aloud the public advertisement, terms of sale, and the parish recorder's certificate of mortgages against the first above-described property, being the Richland plantation, in East Baton Rouge, and having exposed the same to public sale according to law, William S. Pike, of the city of New Orleans, La., became the purchaser thereof, for the sum and price of forty-six thousand seven hundred and twenty-five $\frac{00}{100}$ dollars, ($46,725.00,) which I hereby acknowledge to have received, as follows, under the instructions of the plaintiff and with the consent of the purchaser, viz: Twenty thousand $\frac{00}{100}$ dollars ($20,000) in cash, and in three notes each for the sum of eight thousand three hundred & eighty $\frac{50}{100}$ dollars, ($8,350.50,) bearing ten per cent. interest per annum, the rate of interest of the judgment from this date, payable at the banking-house of Pike, Lepeyre & Brothers, in the city of New Orleans, to the order of the plaintiff, Mrs. Eliza C. Johnson, at one, two, and three years from
108 date, with the agreement, made by the parties, that said purchaser, Wm. S. Pike, reserves the right to pay said note at any time before maturity, at the elected domicil, and with the explicit understanding that, upon the payment and liquidation of said notes, the value of the United States currency is to be estimated at no greater rate of depreciation than as compared with the comparative rate of

gold and United States currency, one the first day of February, eighteen hundred and sixty-six, (1866;) this adjudication and sale to be recorded in the office of the parish recorder of the parish of East Baton Rouge, in the book of mortgages, and the vendor's mortgage to be retained on the property adjudicated, until the full and final payment of the above-described notes, said notes to be paraphed by the recorder to identify them with said property adjudicated as aforesaid, and not to be sold or alienated to the prejudice of the plaintiff, the holder thereof. The balance of the purchase-money, viz, the sum of fifteen hundred and eighty-two $\frac{20}{100}$ dollars, ($1,582.20,) to be paid to
109 Hill and Markham, by said Pike, the purchaser. Now, therefore, know all men by these presents, that I, the said sheriff, do, in consideration of the premises, and by virtue of the act in such case made and provided, grant, bargain, & sell, assign, and set over to the said Wm. S. Pike, and to his legal and lawful heirs and assigns, all the above-described property, to wit:

The "Richland plantation," and all the rights, title, interest, and demand which the said Ackley Perkins, J. M. Williams, and Wm. S. Pike, on the 3rd day of August, (1861,) eighteen hundred and sixty-one, or at any time since, had in or to the said property, to wit, the Richland plantation, or any part thereof to hold the same to the said Wm. S. Pike, and his legal heirs and assigns, forever.

In witness whereof I have hereunto set my hand and seal, at Baton Rouge, this sixth day of January, in the year of our Lord one thousand eight hundred and sixty-six, (A. D. 1866.)

ED. COUSINARD, *Sheriff.*

Sealed and delivered in presence of
(Signed) B. F. BRYAN & A. M. DUNN.

110 *Defendant's bill of exceptions, No.* 10.—*Filed March* 26, 1874.

MARY P. EVANS
vs.
WM. S. PIKE. } No. 6494.

Be it remembered, that on the trial of the case on the 14th day of March, 1873, the counsel for defendant having offered evidence tending to show that Pike, the defendant, had been in possession of the property in dispute since the 6th January, 1866, and that defendant held the property under title from the sheriff of the parish of East Baton Rouge since the adjudication to him of said property by said sheriff, on the 6th day of January, 1866, the counsel for defendant moved the court to charge the jury that—

"The jury is instructed that, if it finds that Pike is in actual possession of the property donated, which plaintiff is now seeking to recover, and if the jury find that Pike is holding said property under a title from a public sale, then Pike is authorized to set up the donation in
111 question as a fraud upon creditors, and thereupon void; and this defence is good when invoked by a party in possession, without regard to time; and the limitation of one year within which to institute a suit to set aside a contract made in fraud of creditors does not apply to a party defendant."

To which the court added:

"I have already instructed you that if you find that Pike was a creditor of Ackley Perkins, and Perkins transferred this land so as to defeat

Pike of any recovery, and so has defrauded him of any right which he might have had, had the conveyance not been made, then he might set up that as a fraudulent conveyance; but I have instructed you more than once that the simple conveyance from Ackley Perkins to Mrs. Evans did not affect the lien that Pike had upon the land, and therefore was not a fraud upon his rlghts."

Whereupon defendant's counsel moved the court to charge—

"That the twelve-months' bond not being recorded, there was no lien upon the land, and that Ackley Perkins conveyed the plantation
112 and slaves unincumbered by any mortgage whatever."

Which charge the court refused to give, "as it was immaterial."

And thereupon counsel for defendants excepted to the aforesaid charge, and the refusal to give the charge just quoted, then and there, and before the jury had retired, and tenders this bill of exceptions for signature and seal, on this 26th day of March, A. D. 1874.

(Signed) W. B. WOODS, *Judge.* [SEAL.]

Petition and order for writ of error.—Filed March 26th, 1874.

United States circuit court.

MARY P. EVANS
vs.
WM. S. PIKE. } No. 6494.

To the honorable the judges of the United States circuit court, fifth circuit and district of Louisiana:

The petition of William S. Pike, defendant in the above entitled and numbered cause, respectfully represent' that he is aggrieved by
113 the final judgment, rendered on the 15th day of March, 1873, and signed on the 24th day of March, 1874, against him and in favor of plaintiff.

That your petitioner is informed and believes that there is error to his prejudice therein; that the said judgment is contrary to law and the evidence adduced; and that the amount in controversy exceeds twenty thousand dollars.

Wherefore your petitioner prays for an order granting a writ of error herein which shall operate as a supersedeas, on petitioner's giving bond in the sum of ten thousand dollars, as fixed by this honorable court; said bond to be filed, according to law, within days from the signing of said judgment; and that said writ be made returnable to the Supreme Court of the United States on the second Monday of October, 1874.

And petitioner prays that a copy of this petition and writ of error be lodged for plaintiff, and complainant herein, in the clerk's office,
114 where the record remains; and that said complainant be served therewith, and thereby be duly notified to appear and answer this application and the aforesaid writ of error; and for all relief.

(Signed) HAYS & NEW,
Attorneys.

Order.

A writ of error, to operate as a supersedeas, is allowed in this case, as prayed for, and according to law, returnable to the Supreme Court of the United States, on the second Monday of October, 1874, the peti-

tioner giving bond in the sum of ten thousand dollars, with good and solvent security, conditioned as the law directs.

New Orleans, March 26th, 1874.

(Signed) W. B. WOODS, *Judge.*

Bond for writ of error.—Filed April 17th, 1874.

United States circuit court.

WM. S. PIKE, PLAINTIFF IN ERROR,
vs.
MARY P. EVANS AND W. R. EVANS, DEFENDANTS in error. } No. 6494.

115 Know all men by these presents that we, William S. Pike, as principal, and Charles T. Howard as sure*tys*, are held and firmly bound unto Mary P. Evans, Wm. R. Evans, and F. A. Woolfley, clerk of the circuit court of the United States for the fifth judicial circuit and district of Louisiana, in the full and just sum of ten thousand dollars, to be paid to the said Mary P. Evans, Wm. R. Evans, and F. A. Woolfley, clerk of said court, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 17 day of April, in the year of our Lord one thousand eight hundred and 74.

Whereas lately at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the district of Louisiana, in a suit depending in said circuit court, wherein Mary P. Evans & Wm. R. Evans, plaintiffs, and William S. Pike, defendant, judgment was
116 rendered against the said William S. Pike, defendant; and the said William S. Pike having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said Mary P. Evans, citing and admonishing Evans to be and appear at a Supreme Court of the United States to be holden at Washington, the 2nd Monday of October next:

Now, the condition of the above obligation is such, that if the said Wm. S. Pike shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) WM. S. PIKE. [L. S.]
(Signed) CHAS. T. HOWARD. [L. S.]

Sealed and delivered in the presence of—
(Signed) J. H. NEW.

Approved:
WM. GRANT, *Atty.*

117 United States of America, circuit court of the United States, fifth circuit and district of Louisiana.

CLERK'S OFFICE:

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, do hereby certify that the foregoing 116 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, on the trial of the case of Mrs. Mary P. Evans and William S. Evans vs. William S. Pike, No.

6494 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 27th day of June, A. D. 1874. Six words erased null before signing.

[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, W. B. Woods, United States judge for the district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand at the city of New Orleans, in said district, this 27th day of June, A. D. 1874.

W. B. WOODS, *Judge.*

118 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the district of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Mary P. Evans and William S. Evans, her husband, plaintiffs, and William S. Pike, defendant, No. 6494 of the docket of said court, a manifest error hath happened, to the great damage of the said William S. Pike, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States, this 26th day of March, in the *the* year of our Lord one thousand eight hundred and seventy-four.

[SEAL.] F. A. WOOLFLEY,

Clerk of the United States Circuit Court for the District of Louisiana.

(Indorsed:) United States circuit court. No. 6494. Wm. S. Pike, plaintiff in error, versus Mary P. Evans & Wm. S. Evans et al., defendants in error. Writ of error. Filed March 26, 1874. F. B. Vinot, dy. clk.

119 THE UNITED STATES OF AMERICA:

Circuit court of the United States, district of Louisiana.

The President of the United States to Mrs. Eliza C. Johnson, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, on

the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein William S. Pike is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said William S. Pike, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 28th day of March, in the year of our Lord one thousand eight hundred and seventy-four.

W. B. WOODS, *Judge.*

120 On this 8th day of April, 1874, personally appeared before me, the subscriber, S. W. Reed, a deputy marshal for the district of Louisiana, who, being duly sworn, declared that he served a copy of the within citation, as stated in his official return hereon.

S. W. REED,
Dy. U. S. Marshal.

Sworn to and subscribed before me,

F. B. VINOT,
U. S. Commr.

(Indorsed:) United States circuit court. No. 6494. Wm. S. Pike, plaintiff in error, vs. Mrs. Mary P. Evans & Wm. S. Evans et al., defendants in error. Citation.

Marshal's return.

Received Mar. 28, 1874, by the U. S. marshal, and, on the 31st day of same month and year, served a copy of the within citation on Eliza C. Johnson, named herein, by handing the same to R. H. Browne, of Randolph, Singleton & Browne, atty. for Mrs. Johnson.

New Orleans, April 8th, 1874.

S. W. REED,
Dy. U. S. Marshal.

121 THE UNITED STATES OF AMERICA:

Circuit court of the United States, district of Louisiana.

The President of the United States to Mrs. Mary P. Evans and William S. Evans, her husband, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein William S. Pike is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said William S. Pike, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 27th day of March, in the year of our Lord one thousand eight hundred and seventy-four.

W. B. WOODS, *Judge.*

122 On this 8th day of April, 1874, personally appeared before me, the subscriber, S. W. Reed, a deputy marshal for the district of Louisiana, who, being duly sworn, declared that he served a copy of the within citation as stated in his official return hereon.

S. W. REED,
Dy. U. S. Marshal.

Sworn to & subscribed before me,

F. B. VINOT,
U. S. Commr.

(Indorsed:) United States circuit court. No. 6494. William S. Pike, plaintiff in error, vs. Mrs. Mary P. Evans & Wm. S. Evans et al., defendants in error. Citation.

Marshal's return.

Received Mar. 28, 1874, by the U. S. marshal, and, on the 31st day of same month and year, served a copy of within citation on Mrs. Mary P. Evans and her husband, William S. Evans, named herein, by handing the same to Wm. Grant, atty.

New Orleans, April 8th, 1874.

S. W. REED,
Dy. U. S. Marshal.

(Indorsement on cover:) No. 605. Louisiana C. C. U. S. William S. Pike, plaintiff in error, vs. Mary P. Evans, William S. Evans, & Eliza C. Johnson. Filed 14th October, 1874.

In the Supreme Court of the United States.

October Term, 1876.

WILLIAM S. PIKE,
PLAINTIFF IN ERROR,
vs.
MARY P. EVANS ET AL.

No. 137.

In Error to U S. Circuit Court for the District of Louisiana.

BRIEF FOR PLAINTIFF IN ERROR.

William S. Pike brings this his writ of error to the United States circuit court of Louisiana to review the proceedings in a suit at law, which is a petitiory action in form, but in substance an action to annul a sheriff's sale made by a State court under execution. The trial resulted in a verdict and judgment against Pike, recognizing Mary P. Evans, the plaintiff in the court below, as the rightful owner of the Richland Plantation in the parish of East Baton Rouge, La., as well as of one hundred acres of land formerly bought by J. and H. Perkins from Phœbe Anderson, and also decreed the immediate restoration of said properties to the possession of Mary P. Evans. It was further ordered that Mrs. Evans recover from Pike $2,500

per year from legal demand, as rent, up to the time the property be restored to her, with costs of suit.

Record, p. 21.

FACTS OF THE CASE.

Both parties derive title from Ackley Perkins.

The facts tending to show Ackley Perkins' ownership are as follows:

J. and H. Perkins having purchased the plantation in question from a Mrs. Eliza C. Johnson, and having failed to pay some of their promissory notes given for the price thereof, bearing vendor's privilege and special mortgage thereon, *Eliza C. Johnson*, [called in warranty,] holder of the unpaid notes, sued upon them in the Seventh Judicial District Court of Louisiana, obtained judgment and execution, and at the first crying by the sheriff under said execution, the property having failed to bring two-thirds of its appraised value, there was no adjudication, but the property was readvertised for sale under the execution, and then offered for what it would bring, on twelve months' credit, and sold by the sheriff to *Ackley Perkins* on August 3, 1861, he giving his twelve months' bond, payable to the said Eliza C. Johnson, for the price, viz., $30,695.80, with ten *per cent. p. a.* interest from date, payable on August 3, 1862, and furnishing joint and several [solidary] securities, to wit: *J. M. Williams*, and *Wm. S. Pike*, the present plaintiff in error. This bond had the force of a final judgment.

Record, p. 22, *et seq.*

Thirty-three days after this sheriff's sale, *Ackley Perkins*, who had thus bought the property on his twelve months' bond, to wit, on September 5, 1861, made an instrument in

writing, called an act of donation *inter vivos*, of the property so adjudicated, to the defendant in error, Mary P. Evans, [then Linton,] his niece, describing it, however, as having been purchased by him at a sheriff's sale on "January 5, "1861, made in the suit of Fellows & Co. *vs.* J. & H. Per- "kins, No. 1610 of the records of the Sixth Judicial District "Court, and recorded in book R, folio 295, notarial acts of "this office," *i. e.*, that of the recorder of the parish of East Baton Rouge.

See Deed of Gift, on Record, p. 28 *et seq.*, and certificate of record, Sept. 7, 1861. In this deed of gift, *Ackley Perkins* entirely ignores his purchase on his twelve months' bond on August 3, 1861, above referred to, and the parties, Ackley and Mary Linton, now the defendant in error, dispense with "the production of a certificate from "the recorder of this parish, as required by article 3328 "of the civil code of this State."

See Record, p. 29.

The twelve months' bond of *Ackley Perkins* falling due and remaining unpaid, *Eliza C. Johnson*, [warrantor,] the original plaintiff and obligee in the twelve months' bond given for the price, issued her execution upon it against all three of its parties *in solido*, viz., *Ackley Perkins*, as principal, *J. M. Williams* and *W. S. Pike*, as the securities; under which execution the sheriff seized and sold the property in question, *for cash*, to William S. Pike, for $46,725, of which he paid $20,000 in cash, and gave three notes, which he paid, for $8,380.50 each, and $1,582.20 to Hill & Markham. Pike received a deed from the sheriff and went into possession which he still retains, on January 6, 1866, or thereabouts.

See sheriff's deed, Rec. p. 24.

The defendant in error was then absent from Louisiana, but avers in her petition that she was in possession by an agent, of the property, and was dispossessed by the sheriff, all of which, no doubt, is true.

From these facts, it appears that *Mary P. Evans* claims ownership of the *locus in quô* by virtue of a deed of gift from her uncle, and for which property neither her uncle nor herself has ever paid a dollar, and that William S. Pike claims ownership of the *locus in quô* by virtue of a judicial sale made in the execution of a judgment obtained by *Eliza C. Johnson* [with special mortgage and vendor's privilege] for an unpaid portion of the price for which the property was originally sold, and for which property Pike, the plaintiff in error, has paid $47,000 and upwards in cash.

Such being the facts of the case, the questions presented by the record for the consideration of the court are—

First. As the plaintiff in error went into possession of the property on the 6th day of January, 1866, (see Rec., p. 3, fol. 8,) and as the suit was not instituted in the lower court until the 19th day of July, 1871, more than five years after such possession had commenced, and as plaintiff in error had held possession under a sheriff's deed, executed to him under a judgment of a competent court and regular in form, for more than five years, (see Rec., p. 26, fol. 75,) whether all informalities in the sheriff's conduct in and about said sale, and particularly the informality of failing to take corporeal possession of the property before he advertised and sold it under execution, were not cured by the lapse of five years under the law of prescription in Louisiana? This question arises from the plea of prescription filed by plaintiff in error in the court below, (see Rec., p. 11, fol. 32,) and on the bill of exceptions.

No. 8, Rec., pp. 32, 33, and 34, and on bill of exceptions, No. 9, Rec., pp. 34, 35, 36, and 37.

Second. The plaintiff in the court below set up as title to the property a deed of gift from Ackley Perkins, one of the defendants in execution on the twelve months' bond, under which the property was sold; was it not then incumbent on the defendant below, relying on such a title, to show that Ackley Perkins had at the time he made the donation property in value twice that of the property donated over and above his debts: failing to make such proof, was the plaintiff below entitled to recover against Pike, who was a creditor of the said Ackley Perkins? and was the plaintiff below not bound to make such proof whether Pike had a lien upon the property or not? and whether such donation was not null as to Pike, a creditor? and whether Pike was not at liberty to show to the jury, by competent evidence, that Ackley Perkins owned no other property than that which the deed of gift to plaintiff in error purported to convey?

These questions arise on the following bills of exceptions, which are closely connected in import, and may properly be all considered together.

No. 1, Rec., p. 22.
No. 4, Rec., pp. 27 to 30.
No. 5, Rec., pp. 30 and 31.
No. 6, Rec., pp. 31 and 32.

Third. Pike, the plaintiff in error, having purchased the property at a sheriff's sale, made under a judgment obtained by a mortgage creditor, which mortgage Pike then paid by paying the price for which the property was adjudicated to him, whether the plaintiff below could recover the property

without refunding to Pike the amount of the mortgage so paid by him?

This question arises on the bill of exceptions.

No. 3, Rec., pp. 26 and 27.

Fourth. The action was erroneously brought in the petitory form, and no right existed in the plaintiff below to inquire in a collateral proceeding into the regularity of the proceedings of a competent tribunal having jurisdiction of the subject-matter, or into the acts of the executive officer of such court; and it is to be determined here whether the court should not have instructed the jury to find for defendant on the whole case?

This question arises on the pleadings in the case, (see pet., Rec., p. 1; amended pet., Rec., pp. 1, 2, and 3;) on the answer of defendant below, (Rec., pp. 5 and 6;) on the bill of exceptions, No. 2, (Rec., pp. 22 to 26;) on bill of exceptions No. 3, (Rec., pp. 26 and 27;) on bill of exceptions No. 8, (Rec., pp. 32 to 34,) and on bill of exceptions No. 9, (Rec., pp. 34 to 37.)

ASSIGNMENT OF ERRORS.

The learned judge of the court below erred:

FIRST. In charging the jury "that if the sheriff did not "seize the property, that is an informality not cured by "possession for five years." The charge to the jury should have been purely and simply as requested by Pike's counsel, that "any informality connected with or "growing out of the sheriff's sale to Pike was cured by "the prescription of five years."

See Bill of Exceptions, No. 8, Record, p. 32.

SECOND. In charging the jury that Pike must prove that the sheriff took the property into his possession before he could make a valid sale of it, and in so charging as to lead the jury to believe that for want of such taking into possession the sheriff's sale to Pike was an absolute nullity.

See Bill of Exceptions, No. 9, Record, p. 34.

THIRD. In treating Mary P. Evans as a third possessor, and entitled to have a demand made upon her before the sale could be made under which Pike, the defendant below, claims; and in charging that, for want of such a demand, the sheriff's sale to Pike was an absolute nullity, by telling the jury that, in order to divest her of title, a demand should have been made upon her before this sale could be made." (Rec., p. 26, fol. 73.)

See Bill of Exceptions, No. 2, Record, p. 22.

FOURTH. In refusing to charge as requested, that "if the "jury finds that Pike was a *bona fide* purchaser of the "property in dispute, and that he paid the mortgage which "was an encumbrance upon the property at the time of "sale, then, should you find a verdict for the plaintiff, you "shall also find that the plaintiff shall refund to Pike the "amount so paid by him, with interest, before taking pos-"session of said property."

Bill of Exceptions, No. 3, Record, p. 26.

FIFTH. In maintaining this suit, the court being without jurisdiction to annul a sale under execution made by a Louisiana sheriff officially, unless absolutely null.

SIXTH. In charging the jury that Pike could neither set up as a defence to this action nor make proof that the

donation from Ackley Perkins to Mary P. Evans was, as to him, Pike, either *void* or fraudulent.

Bill of Exceptions Nos. 1, and 5 and 6, Record, p. 22, fols. 30, 37.

The judge of the court below said to the jury:

"And their"—the defendants'—"defence is that this "Ackley Perkins owned no other property, and that there- "fore he could not make this donation which conveyed all "his property, and it is void. The court instructs you that "this is a defence which this defendant is not authorized to "set up, and you may lay that out of consideration."

Rec., p. 22, fol. 61.

And the judge below further said to the jury:

"But if the jury is satisfied that this conveyance did "not have the effect of defrauding Pike in any way, if his "claim was still a lien upon the land, notwithstanding the "conveyance, I instruct you that he was not defrauded by it."

Rec., p. 30, top.

And the judge below further said to the jury:

"I have instructed you more than once that the simple "conveyance from Ackley Perkins to Mrs. Evans did not "affect the lien that Pike had upon the land, and therefore "was not a fraud upon his rights."

Rec., p. 38, top.

See the Bills of Exceptions, Rec., pp. 22, 27, 30, 31, 32, and 37.

SEVENTH. And in not charging the jury that their verdict should be for the defendant.

POINTS.

First. The informalities complained of by defendant in error, and which constitute the sole foundation of her suit, are, that the sheriff, in proceeding to sell under the twelve months' bond, did not take possession of the property under the seizure, and that neither Ackley Perkins nor the defendant (below) were notified of the seizure.

See Rec., p. 24, top, fol. 66.

But Pike purchased the property under that sheriff's sale, on the 6th of January, 1866, and from that date to the institution of the suit (on the 11th July, 1871) had been in undisturbed possession of the property.

See Rec., p. 26, fol. 75.

Such possession, being of more than five years, cures all such irregularities.

A. The fourth section of the act of March 10, 1834, of the legislature of Louisiana, reads as follows:

"That in all informalities connected with or growing "out of any public sale made by a parish judge, sheriff, "auctioneer, or other public officer, shall after the lapse "of five years from the time of making the same, be pre- "scribed against by those claiming under such sales, "whether they be minors, married women, or persons in- "terdicted."

See Bullard & Curry's Digest, edition New Orleans. 1842, p. 9, § 11.

B. For same section, see "Statutes of the State of Lou- "isiana, revised and prepared by W. B. Phillips, New "Orleans, 1855, p. 22, sec. 4."

C. Same section, Acts of Louisiana of 1855, page 76, foot.

D. The Civil Code of Louisiana, art. 3543, says: "All "informalities connected with or growing out of any public "sale made by any person authorized to sell at public auc- "tion shall be prescribed against by those claiming under "such sale, after the lapse of five years from the time of "making it, whether against minors, married women, or "interdicted persons."

E. The above article of the code is the same, word for word, in the sec. 3392, page 659, of the Revised Statute Laws of the State of Louisiana, New Orleans, 1870.

F. In the law of prescription in Louisiana there is no provision in favor of persons beyond seas. The law there is: "That the laws of prescription now existing whereby "absentees and non-residents of the State are entitled to "longer periods than persons present or residents in the "State before prescription can be acquired against them "be, and the same are hereby, abolished, and hereafter ab- "sentees and non-residents of the State are to stand on the "same footing in relation to the laws of prescription as "persons present or residents of the State: provided that "the act shall not apply to any prescription of one year or "less."

See Act of March 14, 1848; Acts of that year, p. 60.

G. As to the applicability of the prescription we invoke, we refer the court to the following:

Walden *vs.* Canfield, 2 Rob. La. Rep., p. 472, last paragraphs.

Drouet *vs.* Rice, 2 Rob. La. Rep., p. 377, foot.

Leduf *et al. vs.* Bailly, 3 La. Annual, 8.
John S. Brien *vs.* E. Percy Sargent, 13 La. Annual, p. 198.
Robert *vs.* Brown, 14 La. Annual, p. 598.
Budd *vs.* Stenson, 20 La. Annual, p. 573.
Woods *vs.* Lee, 21 La. Annual, p. 505, *et seq.*
Pasiana *vs.* Powell, 21 La. Annual, p. 584.

It is clear, then, that the lower judge erred in telling the jury that this informality was not cured by the prescription of five years.

Second. Pike became a creditor of Ackley Perkins when he signed, as surety, the latter's 12 month's bond, (Rec., pp. 22 and 23; see State *vs* Graham, 23 La. Annual, p. 406, and authorities there quoted,) and he consequently had a right to show that the act of donation by which his debtor, Ackley Perkins, had conveyed the property to plaintiff in error was a nullity, and of no effect as to him, Pike.

The Civil Code of Louisiana says, art. 1497: "The "donation *inter vivos* shall in no case divest the donor of "all his property; he must reserve to himself enough for "subsistence; if he does not do it the donation is null for "the whole."

This is a provision of public policy.

The Code, art. 1980, says: "If the contract be purely "gratuitous, it shall be presumed to have been made in "fraud of creditors if, at the time of making it, the debtor "had not over and above the amount of his debts more "than twice the amount of the property passed by such "gratuitous contract."

The Code, art. 1772, says: "Contracts considered in rela- "tion to the motives for making them are either gratui- "tous or onerous."

Art. 1773: "To be gratuitous, the object of a contract "must be to benefit the person with whom it is made, with- "out any profit or advantage received or promised as a "consideration for it."

The act of donation, therefore, from Ackley Perkins to the defendant in error was a gratuitous contract.

Hence the judge below erred when he ruled out the evidence offered by Pike to show that Ackley Perkins owned no other property, (see Rec., p. 31, fol. 89 and 90,) and erred in the various rulings made in relation to this donation, as exhibited in the other bills of exceptions, viz: No. 1, Rec., p. 22; No. 4, Rec., p. 27, and No. 5, Rec., p. 30.

Third. It appears that Mrs. Eliza C. Johnson, having obtained judgment in the seventh judicial district court of the State of Louisiana against J. & H Perkins, such proceedings were had as resulted in the sale of the property in question on twelve months' credit to Ackley Perkins, who gave his bond in favor of Mrs. Johnson, with J. M. Williams and W. S. Pike as sureties in the sum of $30,000 and upwards.

See Rec., pp. 22 to 25.

The sale of the property on the twelve months' credit did not satisfy the judgment in favor of Mrs. Johnson or novate the debt.

See Trescott *vs.* Lewis, 11 La. Annual, pp. 184–5.
See Hennen's Digest, vol. 1, p. 631–6, twelve months' bond, § 1, and the authorities there cited.

Ackley Perkins, therefore, took the property, subject to the judgment debt, mortgage, and privilege of Mrs. Johnson; and when he transferred the property by deed of gift to

the plaintiff in error she took the property, subject to the same encumbrances, of all of which she had notice, (see Rec., p. 29, fol. 84;) for there it appears by the expression of the instrument the parties, Ackley Perkins and the plaintiff in error, dispensed with the production of a certificate from the recorder.

The article 3328 of the civil code of Louisiana, and which is the article 3364 of the revised civil code of 1870, says: "Every notary who shall pass an act of sale, mort-"gage, or donation of an immovable shall be bound to ob-"tain from the office of mortgages of the place where the "immovable is situated a certificate declaring the privileges "or mortgages which may be inscribed on the object of the "contract, and to mention them in his act, under penalty of "damages towards the party who may suffer by his neglect "in that respect."

The parties, Ackley Perkins and the plaintiff in error, thus recognized that they were fully acquainted with the mortgages and privileges resting on the property, and were content therewith.

The plaintiff in error thus went into possession of the property encumbered with the same burthens that Ackley Perkins took it with when he bought on twelve months' credit at the sheriff's sale; that is, a mortgage on the property for the amount of the twelve months' bond.

See Offut *vs.* Hendsly, 9 Louisiana, (Thomas Curry,) p. 11.

W. S. Pike being one of the sureties on Ackley Perkins' twelve months' bond, (see Rec., pp. 22 and 23,) and having been compelled to pay the same in buying in the property seized and sold by the sheriff on *fi. fa.* issued on said bond, (see Rec., pp. 24 and 25,) became thereby subrogated to all the rights of the judgment creditor, Mrs. Johnson.

The Louisiana Civil Code, Art. 3052, says: "The surety "who has paid the debt has his remedy against the principal "debtor, whether the security has been given with or with- "out the knowledge of the debtor."

Art. 3052: "With regard to that remedy the surety has "the same rights of action and the same privilege of subro- "gation which the law grants to co-debtors *in solido*."

Art. 2161: "Subrogation takes place of right"

* * * 2. "for the benefit of the purchaser of any im- "movable property, who employs the price of his purchase "in paying the creditors to whom this property was mort- "gaged."

3. "For the benefit of him who, being bound with "others, or for others, for the payment of the debt, had "an interest in discharging it."

Thus Pike stood in the place of Mrs. Johnson, with regard to whom Ackley Perkins could have done nothing to abstract the property from her pursuit.

It was therefore impossible for the plaintiff in error to hold the property free of mortgage; and to allow her to keep it without paying the mortage was clearly illegal, and the judge of the court below erred in refusing to charge as asked by the defendant below.

See Bill of Exceptions, Rec., pp. 26 and 27.

Fourth. The twelve months' bond, under the execution on which the property was sold, had the force and effect of a judgment.

See the bond, Rec., p. 23, fol. 66.

The plaintiff in error brought a petitory action for the property. In such action the plaintiff must recover by the strength of his own title exclusively. The plain-

tiff in error did not allege or rely in her petition upon any illegality or irregularity, but in the trial seeks to attack a judgment, and a sale under it, without any such allegations. This cannot be done under the laws of Louisiana.

The plaintiff in error claimed to be the true owner of the property in question by the act of donation from Ackley Perkins, averring that she was in possession.

Her remedy was, then, by a possessory action.

The Louisiana code of practice says:

ART. 46. "The possessory action, which is a branch of "real actions, may be brought by any possessor of a real es- "tate, or of a real right, who is disturbed either in the pos- "session of the estate or in the enjoyment of the right, "against him who causes the disturbance, in order to be "maintained in, or restored to, the possession, whether he "has been evicted or disturbed, provided his possession be "accompanied by the qualifications hereafter required."

ART. 47. "The possessors entitled to bring these actions are those who possess as owners."

"Persons entitled to the usufruct, or to the use of a "real estate, and others having real rights growing from "such real estate, may also bring their action, when dis- "turbed in the enjoyment of their rights."

ART. 49. "In order that the possessor of a real estate, or "one who claims a right to which such estate may be sub- "jected, may be entitled to a possessory action, it is re- "quired:

"1. That he should have had the real and actual posses- "sion of the property at the instant when the disturbance "occurred; a mere civil or legal possession is not suffi- "cient;

"2. That he should have had that possession quietly and "without interruption, by virtue of one of the titles pre- "scribed in the forty-seventh article, for more than a year "previous to his being disturbed, provided the possession "of less than one year be sufficient, in case the possessor "should have been evicted by force or by fraud;

"3. That he should have suffered a real disturbance in "fact or in law;

"4. That he should have brought his suit, at the latest, "within the year in which the disturbance took place.

"When the possession of the plaintiff is accompanied with "all those circumstances it matters not whether he possesses "in good or in bad faith, or even as a usurper, he shall "nevertheless be entitled to his possessory action.

"Art. 50. The disturbance which gives rise to the pos- "sessory action may be of two kinds; disturbance in fact "or disturbance in law."

"Art. 51. Disturbance in fact occurs when one by any "act prevents the possessor of a real estate, or of a right "growing from such an estate, enjoying the same quietly, "or throws any obstacle in the way of that enjoyment, or "evicts him through violence or otherwise."

And on this point see—

Burke *vs.* Tregre, 22 Annual, 632.

Or she should have brought an action to annul the sheriff's sale.

See Dorgenoy *vs.* Drez, 13 Louisiana Rep., (Thomas Curry,) p. 395.

In Delapare *vs.* Warner, (14 La. Annual, p. 414,) the court said:

"But it has been shown by the execution and the sher-
" iff's return, and the notices served upon plaintiff, that the
" property in controversy has been sold, and the defendant
" put in possession by the sheriff AS OWNER, and that some
" portion of the price has been applied to the credit of the
" plaintiff, [IN OUR CASE, THE WHOLE $47,500.] We are of the
" opinion that the plaintiff cannot bring a petitory action
" and ignore the existence of the sale, and treat the pro-
" ceedings as having no existence."

Delapare *vs.* Warner, 14 La. An., 414, and the various cases there cited; particularly Winn *vs.* Elgee, 6 Rob., 100; 10 Rob., 396; 2 An., 467; 19 An., 354; 23 An., 332; 24 An., 445.

See also La Croix *vs.* White, 24 La. Annual, p. 445.

The court below, therefore, should have instructed the jury to find a verdict for the defendant.

On this point, that Mrs. Evans has mistaken her remedy, both the civil and common law pronounce against her.

"Where particular forms of action are prescribed by
" law, it is necessary to an intelligent administration of
" justice that these forms should be complied with."

Richardson *vs.* Johnson, 11 La. An., 390.

"Courts bound by the common law to maintain the
" boundaries between actions."

McManus *vs.* Cassidy, 66 Penn'a, 262.

This view destroys the very jurisdiction of the United States circuit court for Louisiana over this case. How judgments of State courts are EXECUTED can never properly be

brought into contestation before a national court. Not even a co-ordinate court of the State itself has such power. It belongs to the court that renders the judgment to see to its legal execution. No other court, State or national, has sufficient jurisdiction to annul, collaterally, a sale made under its authority, unless the judgment be absolutely void.

The Louisiana Code of Practice says, (art. 629:) "It is "for the court, whether appellate or inferior, which has "rendered the judgment, to take cognizance of the man- "ner of its execution, when the proper manner of exe- "cuting it is to be determined."

See Cornett *vs.* Williams, 20 Wallace, 249.

We submit, then, that the judge below erred in not telling the jury to find in favor of the defendant below and plaintiff in error here.

Respectfully submitted.

DURANT & HORNOR,
for Plaintiff in Error.

WASHINGTON, D. C., *Nov.* 1, 1876.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1876.

No. 137.

WILLIAM T. PIKE, PLAINTIFF IN ERROR,

vs.

MARY P. EVANS, WILLIAM S. EVANS, AND ELIZA C. JOHNSON, DEFENDANTS IN ERROR.

Error from the Circuit Court of the District of Louisiana.

BRIEF OF DEFENDANTS IN ERROR.

BY GEO. W. PASCHAL.

PRELIMINARY MOTIONS.

I. Our first suggestion goes to the jurisdiction of the court, and therefore involves a motion to dismiss the case for want of a writ of error properly signed, and because there is no such bond to the defendants in error as the law requires.

The order allowing "a writ of error to operate as a *supersedeas*" was made by Circuit Judge Wood 26th March, 1874, and is found on page 38 of the record; and what purports to be the writ of error bears the same date, is

signed by the clerk of the Circuit Court, and is found on page 40. But this is in fact a writ of error from this to the Circuit Court, and it ought to have been signed by the judge of that court, who alone could approve the bond. (Rev. Stat., secs. 999, 1,000.) This must be so when the writ is intended to operate as a *supersedeas*. But admitting that the clerk may issue the writ, under article 1004, the *supersedeas* cannot stand; and we move to quash it, and to dismiss the case, because the bond is not good within the statute; there was no writ lodged within sixty days, and it cannot possibly operate as a *supersedeas*.

The final judgment was rendered at the November Term, 24th March, 1873. (P. 21.) The order of Judge Wood for a writ of error and *supersedeas* was not passed until 26th March, 1874, a year and two days later. (P. 39.) It is needless to say that after the expiration of sixty days (Sundays excluded) the circuit judge had no right to grant a *supersedeas*, but application must have been made to one of the justices of the Supreme Court, the writ of error having been lodged and the cost bond given within sixty days. (Rev. Stat., sec. 1007; Kitch *v.* Randolph, at this term, 3 Otto, 000.)

The bond is not taken or approved by the judge, as required by section 1000, but by an attorney. It is not payable to the plaintiffs alone, but to them and the clerk of the court jointly. (P. 39.) The bond is a jurisdictional fact; and there being none in the record, and no valid writ of error, this court is without jurisdiction.

The able review of the precedents and statutes by Chief Justice Waite, at the present term, settles several points in regard to a bond: 1. There must be a cost bond, or a *supersedeas* bond, approved by the judge of the court and lodged within sixty days, or no suspensive appeal can be had or writ issued. 2. Unless this be done the *supersedeas* bond cannot afterwards be issued by a justice of this court. 3. Upon the precedents reviewed, without some bond, there can be no appeal or writ of error; and if there be none, or it be null, this court is without jurisdiction.

II. But if it be possible that these objections are either untenable or come too late as jurisdictional facts, yet the court will certainly quash the bond as a *supersedeas* bond, because it is not payable to the rightful obligee, and was taken without power more than sixty days after the rendition of the judgment.

III. The Bills of Exception.

But should all these objections be overcome, then we insist that the bills of exceptions are not before the court, and there is nothing to do but to affirm the judgment.

As has been remarked, the judgment was rendered 24th March, 1873, and the bills of exceptions were not signed until 26th March, 1874. A whole term had intervened, and the court had then no right to sign the bills of exception. True, a motion for a new trial had been made on 19th March, 1873, and it was taken under advisement. (Record, pp. 17–21.) On 22d March, 1873, the rule for a new trial was continued until the 24th, and on the 25th it was continued until May, and afterwards it was assigned to 21st February, 1874; thus carrying it (so far as the court had power to do it) until the next term. (19, 20.) And the new trial was refused 23d March, 1874. But the judgment remained in force from the day of its rendition, twelve months earlier, and there was no such extension of time as to the preparation of the bills of exception until after overruling the motion for a new trial. (21.)

Our point is that the judgment having been rendered at the November term, 1873, it was not in the power of the court to extend the motion for a new trial until the next term; and all rules extending the time for granting a new trial or adding anything to the record necessarily expired at the end of the term, and the judgment then became a seal of judicial truth entirely beyond the control of that court.

The soundness of this principle is never doubted as to inferior courts. And it is settled upon very high authority as to courts of final resort. (The people *v.* The Mayor

and Aldermen of New York, 25 Wend., 252; Martin *v.* Hunter, 1 Wheat., 325; Real Estate Bank *v.* Rawdon, *et al.*, 5 Ark., 576.) Particular attention is asked to this latter case.

The doctrine is general that a motion for a new trial expires with the term, and cannot be acted upon at a subsequent term. (McKean *v.* Miller, 9 Tex., 58; Laird *v.* The State, 15 Tex., 315; Mason *v.* Russell, 1 Tex., 725; Bullock *v.* Ballew, 9 Tex., 498; Gaines *v.* Dailey, 1 J. J. Marsh, 479; Secrest *v.* Best, 6 Tex., 199.)

In Chambers *v.* Hodges, 3 Tex., 528, Chief Justice Hemphill has exhausted the leading authorities upon the power of the Supreme Court (and, as a matter of course, of the inferior courts) over its judgments and mandates after the expiration of the term. In the very first sentence of the opinion the learned Chief Justice reaches the very marrow of the whole question:

"The jurisdiction of this court is exclusively appellate, but its revisory power is to be exerted, *not over its own judgments, but over those of inferior jurisdiction.* These it has the power to affirm, reverse, and reform, or to remand the cause for a new trial and a more definite decision; but the statute has conferred upon it no authority to revise its own judgments upon the merits, or to effect any material modification to any material thing therein determined."

In favor of this general proposition was invoked the cases of Sibbald *v.* The United States, 12 Pet., 492; Cameron *v.* McRoberts, 3 Wheat., 591; The Bank of the Commonwealth *v.* Wistar, 3 Pet., 431; *Ex parte* Sibbald *v.* The United States, 12 Pet., 491; The Palmyra, 12 Wheat., 10; Martin *v.* Hunter, 7 Wheat., 355, cites Hudson *v.* Guestier, 7 Cranch, 1; Browder *v.* McArthur, 7 Wheat., 58, 59; The Santa Maria, 10 Wheat., 443; and, in the House of Lords, Burnas *v.* Donegan, 3 Dow. P. C., 157; and in New York, *Ex relatione* The Attorney General *v.* The Mayor and Aldermen of New York City, 25 Wend., 253; and also Jackson *v.* Ashton, 10 Pet., 481; *Ex parte* Fontenberry *v.* Foquer, 5 Ark., 202; Rawdon *et al. v.* Real Estate Bank, 5 Ark., 573.

These doctrines are in entire conformity with the principles established in decided cases of the highest authority. In *Ex parte* Sibbald *v.* The United States, 12 Pet., 492, it was declared that the Supreme Court had no power to review their own decisions, whether in a case of law or in equity; that no principle was better settled or of more universal application than that no court can reverse or annul its own final decrees or judgments for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes. (Cameron *v.* McRoberts, 3 Wheat., 591; The Bank *v.* Wistar, 3 Pet., 431;) or to reinstate a cause dismissed by mistake, (Sibbald *v.* United States, 12 Wheat., 10,) and that no substantial change or modification could be made affecting the judgment in any material thing. (Chambers *v.* Hodges, 3 Tex., 529.)

To this rule, as a general one applicable to all courts, bills of review in equity and writs of error *coram nobis* at law were stated to be exceptions. The inferior courts could not vary the decree or examine it for any other purpose than execution, or give any or other or further relief, or review it upon any matter decided on appeal for error apparent, or intermeddle with it further than to settle so much as has been remanded. That after a mandate no rehearing has ever been granted in the House of Lords. (Burnas *v.* Donegan, 3 Dow. P. C., 157.) And on a subsequent appeal nothing is brought up but the proceedings subsequent to the mandate. (Himely *v.* Rose, 5 Cranch, 318; Browder *v.* McArthur, 7 Wheat., 58, 9; The Santa Maria, 10 Wheat., 443. Chambers *v.* Hodges, 3 Tex., 529.)

The doctrine of the want of power after the expiration of the term was affirmed in Rich *v.* Minnesota and Northwestern Railroad Company, 21 How., 82; Washington Bridge Company *v.* Stewart, 3 How., 413; Peck *v.* Sanderson, 18 How., 42; Sibbald *v.* The United States, 2 How., 455.

IV. Now comes the question whether it is allowable in practice, or, indeed, whether the court has power to sign and

seal a bill of exceptions and interpolate it into the record, after the expiration of the term at which the judgment was rendered? Upon principle, this question can only be answered in the negative, because with the expiration of the term the court's power over the record (except to correct clerical errors) ceases.

The general principle may be thus stated:

A party who would except to the ruling of the court upon any question arising at the trial must do so at the time of such ruling. And a bill of exceptions ought to be tendered at the trial, or at as early a period as practicable. (Peters *v.* Henry, 6 Johns., 279; Robertson *v.* Teal, 9 Tex., 345; Houston *v.* Jones, 4 Tex., 170; The State *v.* Lord, 5 N. H., 336. Jones *v.* Thurmond, 5 Tex., 322.)

As a general rule, exceptions to the general charge may be taken before verdict, and reduced to writing at any time during the term, at as early a day as practicable. (Jones *v.* Thurmond, 5 Tex., 323; Houston *v.* Jones, 4 Tex., 170. Bratton *v.* Mitchell, 5 Watts, 59; Life and Fire Insurance Co. *v.* Mechanics' Fire Insurance Co. of N. Y., 7 Wend., 34; Clapp *v.* Bromagham, 9 Cow., 545; Inhabitants of Buckland *v.* Inhabitants of Claremont, 3 Pick., 173; Wilcox *v.* Mitchell, 4 How., Miss., 272.) And in some of the States exceptions to rulings upon evidence shall be taken before verdict. (Jones *v.* Insur. Co. of North America, 1 Binney, 38; S. C., 4 Dall., 249; Morris *v.* Buckley, 8 Serg. & R., 211; McEvers *v.* Mason, 10 Johns., 212; Graham *v.* Strader, 5 Monr., 177. Jones *v.* Thurmond, 5 Tex., 323.)

We now come to the very question whether bills of exceptions found in the record, dated, signed, and filed at a subsequent term, without the special consent of the parties, can be considered as a part of the record? According to the opinion of Chief Justice Marshall, in *ex parte* Martha Bradstreet, 4 Peters, 106, such a practice would be dangerous, and is not to be tolerated. That they must be taken during the trial and signed during the term, and if after the trial, must appear to have been signed *nunc pro tunc*, is re-

garded as among the simple rules in Walton *v.* The United States, 9 Wheat., 658, which is affirmed in Brown *v.* Clark, 4 How., 15. And it was right to strike out an exception found in the record signed two years after the trial. (Sheppard *v.* Wilson, 6 How., 274.)

Our motion is that the bills of exception be stricken out and disregarded.

We now pass to the merits of the case.

V. The History from the Record.

In 1835 Henry and Jehu Perkins purchased the Richland plantation of E. Howell, giving their note for a part of the purchase-price, secured by mortgage on the property. The mortgage act contained a simple hypothecation of the estate to secure the note, and was without the clause styled, under the law of Louisiana, the pact "*de non alienando*," sometimes inserted in the civil-law mortgages. Subsequently Eliza C. Johnson became the owner of the note, and in 1860 she obtained a judgment on the same against J. and H. Perkins, with recognition of the mortgage lien. On 3d August, 1861, she caused the plantation to be sold by the sheriff of the parish of East Baton Rouge, under an execution issued on this judgment. It was purchased by Ackly Perkins for $30,695.80, on a credit of twelve months, he giving his bond for the amount, with W. S. Pike and J. M. Williams as sureties, in payment of his bid. On 5th September, 1861, a month subsequent to his purchase, Ackly Perkins conveyed the plantation, by an act of donation executed before Hubbs, recorder of said parish, to Marie Perkins, then the wife of S. Duncan Linton, now the wife of W. R. Evans, the present defendant in error. Possession was taken at once by the donee, and she remained in possession down to January 6th, 1866, when W. S. Pike wrongfully evicted her, as hereinafter set forth.

During the time the donee held the plantation she and her husband reduced the amount due on the twelve-months bond given by Ackly Perkins, so that in 1865 *there was due only*

about forty thousand dollars to Eliza C. Johnson and other lien creditors. In November, 1865, Johnson took out execution on the twelve-months bond, under the peculiar laws of Louisiana, against Ackly Perkins and the sureties, under which the sheriff of said parish pretended to seize the property, and under which he adjudicated it to W. S. Pike, on January 6th, 1866, for the amount due on said bond.

The contest in this case is between W. S. Pike, plaintiff in error, who claims under this sale of January 6th, 1866, and the defendant in error, who claims title under the act of donation from Ackly Perkins, dated September 5th, 1861. Pike took possession under his deed from the sheriff soon after the sale, Mrs. Linton being then absent, and has held the plantation ever since.

In 1871 defendant in error brought this suit, under the ordinary form of the petitory action, as prescribed by the code of Louisiana, against Pike, to recover the property and its rents and profits, claiming title under the act of donation from Ackly Perkins. To this action Pike filed an answer, setting up the following defenses and exceptions:

1. That the act of donation from Ackly Perkins is null and void, because the donation was purely gratuitous and executed in fraud of the rights of creditors—he, the said Ackly Perkins, not having had at the date thereof other property of twice the value of the property donated, over and above his debts. (Record, p. 15.)

2. Because the donor gave away all he possessed, and did not reserve to himself sufficient for his maintenance. (Record, p. 15.)

3. That he obtained a good and valid title under the sheriff's sale of January 6th, 1866. Record, pages 5 and 15.

4. That the *action* is prescribed by one, three, and five years. (Record, p. 11.)

The case was twice tried in the lower court, resulting

each time in a verdict in favor of defendant in error. At the last trial the following evidence was offered:

VI. Evidence.

1. *By Defendant in Error.*—The act of donation, proof of possession under it, proof of the value of the rents, and evidence tending to show that the sheriff did not take possession of the property at the time of his pretended seizure and sale under the execution through which Pike claims title, or give notice of his seizure to any person.

2. *By the Plaintiff in Error.*—The judgment, the twelve-months bond, the execution issued thereon, and the return of the sheriff, the sheriff's deed of the plantation to Pike in the suit of Eliza C. Johnson *v.* J. and H. Perkins, and proof that Pike paid $46,725 for his title at sheriff's sale. Also the depositions of certain witnesses tending to show that Ackly Perkins owned no other property than that donated.

All of this evidence except the depositions was admitted and received without objection by either party.

VII. The Instructions.

1. *For Evans.*

The court instructed the jury at the request of defendant in error—

1. That creditors holding privileges and mortgages on immovables may pursue their claims on them into whatever hands they may happen to pass, to be paid out of their proceeds according to their rank, if their titles (mortgages) have been registered according to law.

2. That the third possessor of an immovable mortgaged is bound either to discharge the debt or relinquish the property; and if the third possessor fails to comply with this obligation, the mortgaged property may be sold, if thirty days after amicable demand the debt has not been discharged; and further, that the plaintiff in this case stands in the position of a third possessor of the mortgaged

property, and in order to divest her title, a demand should have been made upon her before this sale of January 6th, 1866, could be made.

And thereupon, in the language of the Bill of Exceptions, No. 2, Record, page 26, "counsel for defendant excepted;" but to *what* he excepted does not appear.

3. That the defendant must prove that the sheriff took the property into his possession at the time of his alleged seizure to make such seizure valid. To which defendant's counsel excepted. (See Bill of Exceptions, No. 9, Record, page 34.)

2. *For Pike.*

Counsel for defendant Pike requested the court to charge the jury in substance as follows:

1. That the donation from Ackly Perkins to plaintiff, upon which her title rested, was null and void, because it divested the donor of all his property; that donations *inter vivos* must in no case divest the donor of all his property, and that he must retain enough for his subsistence; and that if he do not the donation is null for the whole. The court refused to give the charge, but instructed the jury that this was a defense which Pike was not authorized to set up. Thereupon counsel for defendant excepted, but to *what* does not appear. (See Bill of Exceptions, No. 1, Record, page 22.)

2. That if the jury find that Pike was a *bona fide* purchaser of the property in dispute, and that he paid the mortgage which was an incumbrance at the time of sale, then, should they find a verdict for plaintiff, they must also find that plaintiff shall refund to Pike the amount so paid by him. But the court refused to give this charge, and the defendant's counsel excepted. (See Bill of Exceptions, No. 3, Record, page 26.)

3. That if the jury find that the title of plaintiff was a donation, then it is a gratuitous contract, and, being gratuitous, it shall be presumed to be made in fraud of creditors, if at the time of making it the debtor had not, over

and above the amount of his debts, twice the amount of the property donated. (Civil Code, La., 1980.) The court gave this charge, but added that if the jury were satisfied that this conveyance did *not* have the effect to defraud Pike, and if his claim was still a lien on the land, "I instruct you that he was not defrauded." To this modification counsel for defendant excepted. (See Bill of Exceptions, No. 4, Record, page 27.)

4. That if the jury find that Pike was a surety on the twelve-months bond prior to the act of donation, then he was a creditor of Ackly Perkins. The court gave this instruction, but added that in order to make the fact that Pike was a creditor to have any effect in this case, defendant must also show that this conveyance by Ackly Perkins to Mrs. Evans had the *effect* of defrauding him. Thereupon counsel for defendant excepted to this modification. (See Bill of Exceptions, No. 7, Record, page 32.)

5. That if Pike has been in possession of the property claimed by plaintiff for a period of five years, having purchased from a person having authority to sell at public auction, all informalities growing out of such sale are cured by the lapse of five years. The court gave this instruction, but added that if the sheriff did not seize the property it is an informality not cured by five years. Defendant's counsel excepted to this modification. (See Bill of Exceptions, No. 8, Record, page 32.)

6. That if the jury find that Pike is in actual possession of this property under a title from a public sale, he is entitled to set up the donation as a fraud upon creditors, and therefore void, and, being in possession, he may invoke this defense without regard to time; and the limitation of one year within which to institute a suit to set it aside does not apply to a party defendant. Which the court gave, but added, "I have already instructed that if you find that Pike was a creditor of Ackly Perkins, and Perkins transferred this land so as to defeat Pike of any recovery, and so as to defraud him of any right he might have had, had the conveyance not been made, then he might

set up that as a fraudulent conveyance; but I have instructed you more than once that the simple conveyance from Ackly Perkins to Mrs. Evans did not affect the lien that Pike had upon the land, and therefore was not a fraud upon his rights."

Counsel for Pike then asked the court to charge the jury further that the twelve-months bond not being recorded, there was no lien upon the land, and that Ackly Perkins conveyed it free of any mortgage whatever. But the court refused to give this additional charge, "as it was immaterial," and thereupon counsel for Pike excepted to the charge given and to the refusal to give the additional instruction. (Record, pages 37 and 38, Exception 10.)

It nowhere appears in the record that these were the only instructions given touching the points in question; nor do the bills of exception pretend to set out the *whole* evidence upon which the instructions were predicated.

Exceptions 5 and 6 are not noted in the foregoing summary.

They are both substantially to the same effect, and hold that if at the date of the donation Perkins had no other property, the donation did not divest the title. In exception No. 5 the court excluded the evidence. In the other, the court refused to instruct the jury that the donor must be worth twice over the amount of the donation; but did say "that, if you are satisfied that this property was conveyed by Ackly Perkins in such a manner as to defeat the rights of Pike, as his creditor, then the conveyance is void, and Pike can set up that fact, but not otherwise."

VIII. Argument.

Waiving, for the present, the question of the sufficiency of the exceptions to sustain the errors assigned by the plaintiff in error, the issues presented may be briefly stated, as follows:

1. Was the sale under which Pike claims sufficient in law to give him title as against Mrs. Evans?

2. Was it competent for Pike to attack the act of dona-

tion under which defendant in error claims title, on the ground that it conveyed away all the donor possessed, contrary to the provision of the civil code?

3. Was it competent for Pike to attack the act of donation as being in fraud of his rights, he being a creditor; and did the court err in the charges given on this point?

All the questions involved in this case may be grouped under these heads, and we shall discuss them in the order here stated:

1. The sale to Pike under the execution issued on the twelve months-bond against Ackly Perkins, in the case of Eliza C. Johnson against J. & H. Perkins, was absolutely void in itself, even as against the defendant in the writ. The sheriff, in his return on the writ, simply stated that he had "seized" the property; but evidence was offered showing that the property was in Mrs. Evans' possession at the time of the alleged seizure, and that the sheriff did not at any time take it into his possession. This omission rendered the sale absolutely null. (Watson *v.* Bondurant, 21 Wallace, 123.) The opinion of Mr. Justice Bradley is so exhaustive in this case that the question cannot be considered as open. The return of the sheriff must show *how* he seized, that the court may judge whether he has complied with the law. It ought to show that he seized and took the property into his possession. (Stockton *v.* Downey, 6 La. An. R., 581–584.)

Evidence was further offered, showing that Ackly Perkins, the defendant in execution, lived out of the parish where the plantation was located, and that he was not even notified of the pretended seizure. This omission is also fatal to the sale. (Birch *v.* Bates, 22 La. An. R., 198.)

The instruction on these points, as contained in the ninth bill of exceptions, was strictly in accord with the law. Thus, had Ackly Perkins, instead of Mrs. Evans, been the owner of the property, the pretended seizure and sale would not have divested him of title.

But much more is it void as against Mrs. Evans, who was a stranger to the whole proceeding. She was a "third

possessor" under the law of Louisiana, and the law has pointed out the process to be followed by the creditor in order to subject the property to sale for the payment of his debt. He was bound to bring the hypothecary action against the property to subject it to the payment of his debt, and to make oath that he had demanded payment thereof thirty days previous to instituting the suit. (Civil Code La., art. 3402; *Ibid.*, arts. 3399–3407; Joyce *v.* De La Lande, 6 La. R., 277; Richards *v.* Nolan, 3 Martin's La. R., N. S., 336.)

In the case of Richards *v.* Nolan, last cited, the facts were almost identical with those in this case; and it was based upon previous cases.

Even without these express provisions of the law, by common right, she would be entitled to a day in court, in which she might defend her property from seizure and sale to pay the debt of another. But it is claimed in this case, in the face of the statute, that Mrs. Evans could be divested of title by a sale under an execution to which she was not a party, and without any notice whatever—actual, constructive, or implied. The only case in which a creditor may proceed to foreclose his mortgage without making a subsequent purchaser party to the proceedings, even in Louisiana, is where the mortgage contains the clause *de non alienando*—a stipulation by which the mortgager agrees not to alienate property to the prejudice of the mortgage. In that case, according to the laws of Louisiana, a third possessor is not entitled to any notice. The creditor may ignore him and proceed directly against the original mortgager. (Williams *v.* Morancy, 3 La. An. R., 223.) But this is a harsh proceeding, and it ought not to be allowed beyond the very letter of the law. The courts in Louisiana favor third possessors to such an extent that they give the rights of a third possessor to a person who obtains possession of property after a decree has been rendered against the property for a mortgage debt and before seizure, where the mortgage does not contain the fact *de non alienando.* (Brown *v.* Routh, 4 La. An. R., 270; Mas-

kell *v.* Merriam, 9 Robinson La. R. 69.) Neither the mortgage nor the twelve-months bond contained any such clause.

The court on this point gave the instruction asked for in the very words of the law, adding that Mrs. Evans stood in the position of a third possessor, and that demand should have been made on her before a sale could be made to divest her title. The defendant "excepted," but to *what* does not appear. (See Bill of Exceptions, No. 2, pp. 22–26.) It could not be to the failure to give his abstract instructions, for they were given. If the exception was to the qualification, the defendant should have put his finger upon the error. And we have seen that the qualification is supported by the law.

IX. Prescription.

But it is claimed that Pike's plea of prescription of one, two, three, and five years covers all these irregularities and nullities. (P. 11.) This plea is clearly bad for the reason that it does not specify which of these several terms are relied upon. It presents no issue. (Lyon *v.* Bertram, 20 H., 149.) It is bad for the further reason that it does not plead any of these prescriptions against the informalities and nullities growing out of the sale under which he claims. The plea, if good for any purpose, is directed against the *action* of the plaintiff, and none of these terms of prescription apply to the petitory action as such.

But, conceding the plea to be sufficient in form and substance, the court properly instructed the jury that if the sheriff did not take possession of the property this was an informality not cured by five years. (See eighth bill of exception, p. 34.) In the case of Morton *v.* Reynolds, 4 Robinson's La. R., 26, it was held that the prescription of five years related to and cured merely irregularities in the advertisements, time, place, and terms of sale occurring *after* a legal seizure. But informalities could not apply to all manner of nullities. The statute is not curative of such.

X. Donation.

2. Article 1497 of the Civil Code of Louisiana provides: "The donation *inter vivos* shall in no case divest the donor of all his property; he must reserve to himself enough for subsistence; if he does not do so the donation is null for the whole." It is claimed that Pike had a right to set up a violation of this article of the code to defeat the act of donation under which Mrs. Evans claims. The instruction asked for on this point was in the language of this article, but the court refused to give it, stating that this was a defense which Pike was not authorized to set up. Defendant's counsel "excepted," but to *what* does not appear; nor does it appear that any clear evidence was offered on this point. (Pp. 37, 38.)

The right to dispose of and receive by donation *inter vivos* is granted by article 1470 of the Civil Code of Louisiana, and the provisions of the article first quoted operate simply as a limitation on this right to give. In 1861 Ackly Perkins donated to his niece, Mary P. Linton, now Mrs. Evans, the Richland plantation, a *specific* property. Neither in terms nor in fact did he give away all he possessed; so that the act of donation does not on its face incur the prohibition of the statute.

This limitation was manifestly made for the protection and security of the citizen against his improvidence, for the right to give is expressly recognized, and it is, therefore, neither immoral nor against public policy. Other limitations also exist, as that a person shall not give away more than two-thirds of his property if he has one child, etc. (Civil Code, La., art. 1493 to 1499.) And the law has provided the mode by which excessive donations may be reduced or annulled. (Civil Code, La., art. 1502 to 1518.) But the exercise of this right seems to have been wholly vested in the heir, for no specific provision is made for the annulment of any donation by the donor himself during his lifetime. The law has cast a species of minority over the citizen as to the right to give. As to the deed of

an infant, the settled American rule is that unless it contains on its face proof of its illegality, it is not void, but merely voidable by the infant. (Tucker *v.* Moorehead, 10 Pet., 70; Fetrow *v.* Wiseman, 40 Ind., 150, 151.)

The nullities pronounced against the sale of minors' property are for their protection. They are but relative. Strangers cannot set them up. (Richard *v.* Deuel, 11 Robinson's La. R., 508.)

But nullity attaches to but few acts, not to some even against public policy. (Gibson *v.* Foster, 2 La., Ann. R., 503; Touillier on Oligations, 2 vol., No. 481.) The rule is so philosophically treated in this case as to preclude all further discussion. It shows that to treat as nullities all acts done in the face of a prohibitory law would destroy property itself. Thus the law prohibits the sale of property under execution, unless it bring more than the prior mortgages against it; but this prohibition is solely in the interest of the owner. A mere stranger cannot set it up to defeat title. (Whitehead *v.* Cramer, 9 La. Ann. R., 216.)

The sale of dotal property is prohibited, but this prohibition can only avail the person affected. (Ross *v.* Ross, 3 La. Ann. R., 533.)

The purchase of soldiers' land warrants, though prohibited by law for the protection of the soldier, is not void, as between those dealing in them. (McBlair *v.* Gibbes, 17 H., 232, 236; Brooks *v.* Martin, 2 Wall., 70; Dupre *v.* McCullough, 6 La. Ann. R., 146.) The case of Brooks *v.* Martin is decided upon the authority of Sharp *v.* Taylor, 2 Philips Ch., 801. It also reviews other cases, and is itself an authority in this case.

Though aliens may be prohibited to hold lands, and that for reasons of public policy, their title is good against all the world, and even against the Government until after office found. (3 Blackst. Comm., 209; Craig *v.* Bradford, 3 Wheat., 594, 599; Ostreman *v.* Baldwin, 6 Wall., 121.)

The sale of Indian lands, though prohibited by the Spanish laws, is not void; at least third persons cannot

set up the nullity. (Spencer *v.* Grimball, 6 M. N. S. La. R., 355; Martin *v.* Johnson, 5 M. N. S. La. R., 655.) The first-named case is full to the point that if the contract be a nullity, the grantor alone can avail himself of it. It also annihilates the supposed distinction between the case of plaintiff or defendant. It is enough that Mrs. Evans has the legal title.

Pike seeks to defeat the act of donation without restoring the property to the person the law intended to protect, and without making that person a party to the proceedings. The court properly refused to allow defendant to offer evidence to support this part of his defense for these reasons.

XI. Creditors.

The other ground of defense is that the act of donation was made in fraud of creditors. Though the court admitted Pike to a full defense under this plea, he was not entitled to make it. The right to annul contracts and transfers in fraud of the rights of creditors is governed by special law.

1. The party suing must have a judgment against his debtor. (Civil Code of La., arts. 1972, 1974.)

2. Both parties to the fraudulent transfer must be joined in the suit for the nullity. (Arts. 1972, 1974.)

3. The action must be brought within one year of the date of the judgment. (Ibid.)

4. The contract must not only have been made in bad faith, but it must have the *effect* to injure the creditor. (Art. 1970.)

5. If made in good faith, it cannot be annulled, even though it injure the creditor. (Ibid; Potier *v.* Harmon, 1 Rob. La. R., 527; Taylor *v.* Whittemore, 2 Rob. La. R., 99; Lafleur *v.* Hardy *et al.*, 11 Rob. La. R., 493.)

The action, to be maintained, even in Louisiana, must be brought for that express purpose in a distinct suit in which all parties in interest must be joined. (Nimmo *v.* Allen, 2 La. Ann. R., 451.) It is essentially a suit brought

by a creditor to subject the property fraudulently conveyed away by his debtor to the payment of his judgment, and is similar to the ordinary creditor's bill. Thus it has been held that a donation from a husband to his wife is a real contract, and a creditor of the husband cannot attack it collaterally. It must be set aside by direct suit. (Hannan *v.* Pritchard, 6 La. Ann. R., 731; Johnson *v.* Alden, 15 La. Ann. R., 505.) This last case, upon a review of authorities, holds that donations are but relative nullities, and can only be avoided by the donor, and they cannot be treated as void by him, and the preceding one is equally for our purpose conclusive against collateral attacks.

In the case of Trahan *v.* McMurray, 2 La. R., 211, the plaintiff claimed title under a deed from Trahan and wife. Defendant set up title under a subsequent judgment and execution sale, and alleged the plaintiff's title to be fraudulent. But the court held that, if the sale from Trahan and wife was fraudulent, defendant must bring a direct action to annul it. The title of a donee, though fraudulent as to creditors, is good against all the world save creditors, and is defeasible by them only in a suit by bill to subject the property to the payment of their claims. (Backhouse *v.* Jett, 1 Brock, 500.)

The rule that a creditor cannot disregard a conveyance made by his debtor, though made in fraud of his rights, has never been departed from in Louisiana. There is but one exception to this rule, and this is but a seeming exception and not a real one. It is where the judgment creditor can show and prove that the conveyance is simulated. Thus, a sale passing the paper title merely, but not intended to divest the grantor of his interest in the property, is of this class. A creditor may seize and sell property, thus transferred without resorting to the revocatory action.

But the simulation must be alleged and established whenever a title thus acquired is set up against the one opposed to it. But simulation is not set up as a defense in this case. The donation is admitted to be real, but alleged to be fraudulent as to creditors. The proof is that the

donee took possession of the property under her title in 1861, and remained in possession until after the sheriff's sale January 6, 1866. Formal acceptance of the deed of gift and a delivery of the object are what constitute the reality of all donations. These two facts are conclusive of the intention of the donor to give and of the donee to receive. This sort of conveyance may operate, under certain circumstances, as a fraud on creditors; but it is real, not fictitious or simulated.

The only evidence offered on the trial by the defendant to show fraud was the several deeds, sheriff's returns, etc., and upon these alone are predicated the instructions asked for. Fraud could not be presumed from an inspection of of the bare face of these documents, and it is nowhere alleged that any other evidence was offered tending to show it.

XII. The Objection.

Admitting, however, that Pike had the right to defend on this ground, were the instructions to the jury erroneous? The court, so far as disclosed by the bill of exception, in substance charged the jury that Pike was a creditor of Ackly Perkins at the time the act of donation was passed; that the donation being purely gratuitous, it is presumed to be made in fraud of creditors, if the debtor had not at the time over and above his debts twice the amount of the property donated; that if Ackly Perkins transferred the property so as to defeat Pike's rights, it was a fraud on creditors which Pike might set up; *but that the simple conveyance from Ackly Perkins to Mrs. Evans could not defraud Pike if his claim was still a lien upon the land.* It is to the modification contained in this last sentence that the defendant excepted, as well as to the refusal of the court to charge the jury that the twelve-months bond not being recorded there was no lien upon the land. The general rule under all systems of law is that the act complained of must have the effect to injure the creditor. Under the law of Louisiana the contract must not only have been

made in bad faith but it must operate to the injury of the creditor also. (Civil Code of La., art. 1970.) The charge was correct, unless the court is prepared to admit that a deed made in good faith and which does not operate to injure any one is void; but the refusal to charge as to the twelve-months bond is also proper, as the defendant had no right to ask the court to charge that the bond was not a lien in the absence of any evidence on that point.

The whole defense, so far as it rests on the issue presented by the answer, is predicated on facts which could only avail the proper parties in a suit in equity. Not even in Louisiana do they constitute a defense to a petitory action.

But whatever may be the practice in the State courts, this hybrid mixture of law and equity established by the codes of the different States cannot be transplanted into the courts of the United States. (Greer *v.* Mezes, 24 H., 268.) In the Circuit Court of the United States suits for the recovery of land can only be maintained upon a legal title, and never while the patent remains in the Government. (Fenn *v.* Holmes, 21 How., 481; Sheirburne *v.* De Cordova, 24 How., 426; Vaughan *v.* Chestnut, 2 Wash., 160; Simms *v.* Irwin, 3 Dallas, 425.) That the plaintiff must recover upon his legal and not his equitable title in that court is an elementary principle. (Goodlith *v.* Jones, 7 Term, 49; Doe *v.* Wroot, 5 East., 132; Roe *v.* Head, 8 Term, 118; Robinson *v.* Campbell, 3 Wheat., 221; Parsons *v.* Bedford, 6 Pet., 768, 769; Parrish *v.* Ellis, 16 Pet., 768, 769; Parish *v.* Ellis, 16 Pet., 453, 454, Bennett *v.* Butterworth, 11 How., 669; Fenn *v.* Holmes, 21 How., 438, 486.)

XII. An Exuitable Defense.

A question not involved in the answer of Pike was raised in the instruction asked for as set out in the third bill of exceptions at page 26. Defendant asked the court to charge the jury that, in case they found for Mrs. Evans, they must also find that she must refund to defendant the amount he

paid to discharge the incumbrance on the property. This was refused, and properly. He attempted to avail himself of an equitable bar, without pleading it, through an instruction to the jury. In effect he asked for judgment against Mrs. Evans for a sum of money not claimed in reconvention or by offset to the rents. Even in a Louisiana court he could not have this relief under his pleadings, though he might be in law entitled to it in a proper proceeding. Judgment must conform to the pleadings. If on an issue not presented, it will be reversed on appeal. (Patterson *v.* The City of New Orleans, 20 La. Ann. R., 105.) No relief can be granted except such as may be agreeable to the case made by the bill. (Story's Eq. Plead., 40; English *v.* Foxall, 2 Pet., 595; Texas *v.* Hardenburg, 10 Wall., 86.) And it has become a rule in this court that the things proved, but not pleaded, have no more effect than the things pleaded but not proved.

Judgment cannot be rendered in defendant's favor for a balance of account unless he *specially* prays for it in his answer. (Conprey *v.* Defour, 1 Martin, N. S. La. R., 90.)

Defendant in a petitory suit cannot recover for his improvements unless he asks for them in his answer. Allowance would be *extra petition.* (Laurey *v.* Barnes, 13 La. Ann. R., 392.)

But neither in equity nor under the law of Louisiana is Pike entitled to reimbursement of the price from Mrs. Evans, even had he claimed it in his answer. "The purchaser evicted from property purchased under execution shall have his recourse for reimbursement against the debtor and creditor." (Civil Code of La., art. 2621.)

The law has thus cast Pike's action for reimbursement against the seized debtor and the creditor. Mrs. Evans is neither the debtor nor the creditor in execution.

Supplemental Brief.

It is assigned as a ground for a new trial, on the face of the record, (page 18,) that the act of donation was not passed before a notary, and is therefore null and conveyed

no title. As this was not pleaded nor urged as an exception to evidence, nor made the basis of an instruction and exception, this court has no jurisdiction over the point.

Plaintiff in error relies on the textual provisions of article 1536 of the Civil Code, which provides that acts of donation must be passed before a notary under the pain of nullity. The article was contained in the original code as adopted in 1828, at which time there was no other officer authorized by law to pass authentic acts in the State of Louisiana. In 1846 the Legislature granted notarial powers to the recorders of the various parishes of the State outside of Orleans parish, in the following words:

"An act to create the office of recorder for the several parishes of the State, the parish of Orleans excepted.

"SEC. 1. That there shall be in and for each parish of the State, the parish of Orleans excepted, a public officer, who shall be styled the recorder. He shall be vested with all the authority, and he shall exercise all the powers and perform all the duties, that now appertain to notaries in general, and to the parish judges when acting in the capacity of notaries." * * * (Acts of 1846, p. 71, No. 104.)

The remaining sections of the act merely define the other duties of the recorder, and are immaterial to the question under consideration.

By this act, whatever powers notaries had in 1846 were conferred on the recorders. The law remained as above until a general revision of the statutes of the State in 1855, when all the general laws of the State were modified, revised, and re-enacted, so far as the Legislature desired to retain them. Under this revision two separate acts were passed, creating and defining the powers of notaries and recorders, in the following words:

"An act relative to notaries public.

"SEC. 1. * * * That the Governor shall nominate and appoint, by and with the advice and consent of the Senate, as many notaries public as may hereafter be authorized by law. * * *"

"SEC. 2. * * * That notaries shall have power within their several parishes to make inventories, appraisements,

partitions, to receive wills, make protests, matrimonial contracts, conveyances, and generally all contracts and instruments of writing; to hold family meetings and meetings of creditors; to receive acknowledgments of instruments under private signature; to affix the seals to the effects of deceased persons, and to raise the same; and all acts executed by them in conformity with the provisions of article 2231 of the Civil Code shall be authentic acts." * * * (Act No. 261, p. 322, acts of 1855, approved March 14, 1855.)

The next day act 318 was passed, entitled "An act relative to recorders." Section one of this act creates the office of recorder, and section two, defining his powers, is an exact transcript of section two of the act defining the powers of notaries, providing expressly that the acts of recorders, when passed in accordance with article 2231 of the civil code, shall be *authentic acts*, and their public acts are made authentic. (Act No. 318, p. 406, sec. 2, acts of 1855, approved March 15, 1855.)

These acts provide severally for the appointment of the notaries and the election of recorders, and repeal all laws *contrary* to their provisions, and all laws on the same subject-matter, except what is contained in the Civil Code and the Code of Practice. But there is nothing in the Civil Code on the same subject-matter, *i. e.*, creating a recorder or defining his powers or affecting notaries. There is simply the article directing donations to be passed before a notary and declaring the effect as evidence of all notarial acts. It will be seen that the same powers are conferred on recorders and notaries as relate to the passing of authentic acts *in hæc verba*. Outside of the parish of Orleans their powers remain concurrent.

"The authentic act is an act executed before a notary (or other officer authorized to exercise such functions) and two witnesses." (Civil Code La., art. 2234.)

It will be observed that while the Civil Code provides that the act of donation shall be passed before a notary, the statute creating that office does not confer the power to pass the same in express terms. Both the notary and the

recorder draw their powers from section two of the acts above referred to. At the time these laws were passed recorders were *ex officio* notaries. The Legislature intended to and did continue in recorders the notarial powers granted in the act of 1846, for it decreed that all their acts passed in accordance with article 2234 should be authentic, *i. e.*, the same as if executed before a notary public and two witnesses.

All these laws are on the same subject matter, and, by the universal rule of construction, they are to be considered together. In Louisiana this rule is established by article 17 of the Civil Code. Article 18 of the same code further provides that the reason and spirit of a law must be considered in construing it—the reason and spirit which induced the Legislature to pass it. (Waldo *v.* Bell, 18 La. Ann. R., 329.)

In the case of the State *v.* Wiltz, 11 La. Ann. R., 339, the Supreme Court, in passing upon the effect of the act of 1855 as to the office of recorder of mortgages for the parish of Orleans, held that this act of 1855 but re-enacted the substance of the previous acts on the same subject, leaving the duties of such recorders untouched as before. The same rule of construction manifestly applies to the office of recorder of the other parishes. The act of March 14th, 1855, but re-enacted the provisions of the act of 1846, which gave recorders full notarial powers. It only repealed the last-named act so far as it was repugnant to it. It is clearly not repugnant to but is consistent with it. Before the passage of the act of 1855, recorders could execute all acts which notaries could; but that act neither changed the office nor restricted the powers of the officer; it simply gave recorders the same powers as notaries by *specific enumeration*, instead of providing in general terms that they should perform all acts that notaries were empowered to perform, as in the act of 1846.

All these acts of 1855 are *in pari materia;* and being a mere codification of previous laws, they must be considered merely as acts in furtherance of the old laws on the same

subject. It was the manifest intention of the Legislature to continue the recorders in office with the same powers they had previous to 1855, and so careful were the authors of the codified laws of 1855 that they gave recorders notarial powers in specific terms.

The doctrine laid down in the case of The State *v.* Wiltz, 11 La. Ann. R., 339, as to the object and effect of the revisory laws of 1855, has been uniformly followed in Louisiana. (Succession of Fletcher, 12 La. Ann. R., 498; State *v.* Kitty, Ib., 705.)

The repealing clause of the several acts of 1855 did not repeal prior provisions of the law re-enacted in the revisory statutes. (Stafford *v.* His Creditors, 11 La. Ann. R., 470.)

Subsequent laws do not repeal former ones by containing different provisions; they must be contrary. (Saul *v.* His Creditors, 5 Martin La. R., N. S., 569.)

The act of 1855, relative to recorders, simply re-enacted the act of 1846 in more ample terms. The only change is in the phraseology. The substance of the two acts is the same. They both grant notarial powers to recorders. The intent of both the acts was to give to each country parish an officer authorized to execute authentic acts—instruments passed before a notary and two witnesses—because in sparsely-settled parishes the business would not support a notary. This was the "*mischief*" intended to be cured by the statute. It is a curious fact that neither the act relative to notaries nor that relative to recorders authorizes either of these officers to pass acts of donation in specific terms. Both officers draw their authority from the two acts of 1855, which are the same *in hæc verba.* The notary does not draw any of his power from the Civil Code, for the code simply directs that acts of donation shall be executed before a notary; but the act of 1855, relative to recorders, declares that the acts of the latter, executed in accordance with the Civil Code, shall be authentic; that is, have the same character as if executed before a notary.

It seems evident that the substance of the acts of 1846 and 1855 is to make recorders *ex officio* notaries; and that

the Legislature so intended is conclusively shown by the clause in the act of 1855 giving all acts executed before them the authentic character of acts passed before notaries.

A reference to a few of the established rules of construction of statutes *in pari materia* carries out this conclusion. The whole system of legislation upon the subject-matter may be taken into consideration in order to aid in the construction of a statute relating to the same subject-matter. Hence statutes *in pari materia*, whether they be repealed or unrepealed, may be considered. (Smith's Commentaries, p. 701, par. 637; Church *v.* Crocker, 3 Mass., 21.)

So, too, where one statute was undoubtedly the consideration of the Legislature when *passing another*, the former ought, though long since expired, to be taken into consideration in construing the latter, and this because all laws on the same subject must be taken as one system. (Smith's Commentaries, p. 752; Thayer *v.* Dudley, 3 Mass., 296.)

The several statutes are to be taken together, because they are considered as having the same object in view, and as acting upon one system. (Rex *v.* Loxdale, 1 Burrows, 447; Earl of Aylesbury *v.* Pathison, Douglas R., 27.)

The object of this rule is to carry into effect the intention of the law; for it is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy. Upon the same principle, whenever power is given by a statute, everything necessary for making it effectual is implied. (1 Kent Comm., 463.)

Statutes passed at the same session must be construed together as *in pari materia*. (Smith's Commentaries, page 755, par. 641.)

The result of these rules of construction is this: considering the object of the acts of 1855, and the fact that they were all passed at the same session merely for the purpose of revision and codification, we may conclude that the Legislature has declared that recorders and notaries should have the same powers to execute acts of conveyance, &c., in the parishes outside of Orleans; for they had those powers at the time of such revision, and they were continued in

them by a more specific enumeration; that the act of 1846 granting notarial powers to recorders was not repealed but in effect reaffirmed. This intention is made clear by the concurrent act No. 122, page 112, of the acts of 1855, section 19, which defines a fee bill for recorders acting as notaries.

Recorders have been in the undisputed exercise of notarial powers in Louisiana for forty years. Nearly every title to property in the country parishes has been executed before them, and during that time the validity of their acts has not been questioned in the courts of the State in a single case. The practice of the State must be taken as a contemporaneous construction of the law. In Pennsylvania a statute of 1815 required all deeds to be acknowledged before a justice of the peace of the county where the land was situated, yet it was decided that the acknowledgment of a deed before a judge of the Supreme Court pursuant to usage was valid, notwithstanding the words of the statute. The rule followed in that case goes much farther than it is necessary to go in the one at bar; but it is doubly decisive of the principle we contend for. (McKee *v.* Delancy's Lessee, 5 Cranch, 22.)

We conclude, therefore, that no objection to the act of donation, which was declared upon by the plaintiff and answered by the defendant in the answer, nor to it when offered in evidence, and no instruction having been asked upon it,—nothing in fact having been objected to except in the motion for a new trial,—which motion was suffered to expire before any action was taken upon it, the question of an authentic act *vel non* cannot be considered by this court, and if it could we have seen that the recorder had the power to inscribe the archive.

And we may here add that the object of requiring timely objection to a public instrument is to give an opportunity to prove it to the satisfaction of the court. For if an objection exist to a public instrument, which prevents its being made as an authentic act, it may still be proved as a private act with like effect when proved.

In Clay *v.* Holbert, 14 T., 201, after an examination of all the Spanish authorities accessible, it was ruled that the grant having been executed with the assistance of but one witness did not make it a nullity, but it only affected the faith and credit to which it was entitled as evidence; that if there had been two assisting witnesses, it would have made full proof and been entitled to full faith; but if only one, it was not proof of itself, but required proof *aliunde* of its having been executed before it could be read in evidence. And the same is the rule in regard to stamped paper. (Jones *v.* Montes, 15 T., 352.) It is not, *ipso jure*, a nullity, but remains valid and effectual, provided its execution by the commissioner be proved by competent and sufficient evidence. (Javent *v.* Le Breton, 8 Mart. N. S., 501; Ruis *v.* Chambers, 15 Tex., 587; Watrous *v.* McGrew, 16 Tex., 511.) And the same doctrine is held in Givens *v.* Bastrop, 26 T., 312.

We ask the affirmance of the judgment.

GEO. W. PASCHAL.